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No. 92-

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

FREDERIC J. RAYMOND, *et. al*,
Petitioners,

v.

MOBIL OIL CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a former employee alleging involuntary discharge in violation of § 510 of the Employee Retirement Income Security Act of 1974 ("ERISA") is a "participant" with standing to sue under the Act if he shows that but for the § 510 violation itself he would still be in covered employment or whether, as the Tenth Circuit held in this case, he lacks standing to sue—regardless of his employer's intent to interfere with his pension rights—if he received all vested benefits earned through the date of his discharge?

2. Whether this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), means, as the Tenth Circuit held, that standing to sue under ERISA is determined as of the time of suit or whether *Firestone* and the language of ERISA require that standing be determined as of the time of the alleged violation of ERISA?

3. Whether employees alleging a violation of ERISA § 510 may sue only under ERISA § 502(a)(1) to recover earned benefits not received or whether they may recover under § 502(a)(3) "other appropriate equitable relief" to "redress" the alleged § 510 violation?

LIST OF PARTIES

Petitioners, plaintiffs-appellees, below:

Frederic J. Raymond, J.A. Morrison, Robert G. Jacobsen, Donald F. Hill, George H. Liveris, Robert A. Irwin, A.D. Bond, Virginia Howard, Ira S. Reavis and Billy Rhea Sargent, for themselves and on behalf of others similarly situated, as part of a class certified by the District Court under Fed. R. Civ. P. 23.

Respondent, defendant-appellant, below:

Mobil Oil Corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
RELATED CASES	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. Factual Background	3
1. The July 1984 Plan Amendment	3
2. The September 1984 Plan Amendment	5
3. Mobil's Misrepresentations and Concealments	5
4. Mobil's Violations of ERISA § 510	7
B. The Proceedings Below	8
REASONS FOR GRANTING THE WRIT	12
I. THE TENTH CIRCUIT MISCONSTRUED THIS COURT'S DECISION IN *FIRESTONE* AND, AS A CONSEQUENCE, EFFECTIVELY READ § 510 OUT OF ERISA	14
II. THE TENTH CIRCUIT ALSO MISCONSTRUED THE "REASONABLE EXPECTATION OF RETURNING TO COVERED EMPLOYMENT" PRONG OF *FIRESTONE*	18
III. THE FIFTH CIRCUIT'S DECISION IN *CHRISTOPHER* IS CONSISTENT WITH *FIRESTONE* AND DOES HARMONIZE THE PERTINENT PROVISIONS OF ERISA	20

TABLE OF CONTENTS—Continued

Page

IV. THE TENTH CIRCUIT ERRED FUNDAMENTALLY IN REJECTING THE PROPOSITION THAT STATUTORY STANDING TO SUE UNDER ERISA SHOULD BE DETERMINED AS OF THE TIME OF THE ALLEGED VIOLATION, RATHER THAN AS OF THE TIME OF SUIT OR TRIAL OR SOME OTHER UNSPECIFIED TIME 23

V. THE TENTH CIRCUIT ERRED FUNDAMENTALLY IN LIMITING ERISA TO THE DIRECT PROTECTION OF BENEFITS AND BY HOLDING THAT § 510 OF ERISA IS ENFORCEABLE ONLY UNDER § 502(a)(1) 24

CONCLUSION 27

APPENDIX A

United States Court of Appeals 10th Circuit Opinion (*Raymond*) (January 20, 1993) 1a-23a

APPENDIX B

United States Court of Appeals 5th Circuit Opinion (*Christopher*) (January 24, 1992) 24a-48a

APPENDIX C

United States Court of Appeals 10th Circuit Opinion (*Mitchell*) (February 16, 1990) 49a-69a

APPENDIX D

United States District Court for Colorado Order Certifying Question (July 21, 1992) 70a-71a

APPENDIX E

United States Court of Appeals 10th Circuit Denial of Rehearing (March 10, 1993) 72a-73a

TABLE OF CONTENTS—Continued

APPENDIX F

Page

United States District Court for Colorado Denial of Motion for Summary Judgment (June 25, 1992) 74a-79a

APPENDIX G

Statutory Provisions 80a-88a

TABLE OF AUTHORITIES

CASES: Page

Amalgamated Clothing and Textile Workers v. Murdock, 861 F.2d 1406 (9th Cir. 1988) 10
Berger v. Edgewater Steel Co., 911 F.2d 911 (3d Cir. 1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1310, 113 L.Ed.2d 244 (1991) 14, 22
Boren v. Southwestern Bell Tel. Co., 933 F.2d 891 (10th Cir. 1991) 22
Bowen v. Massachusetts, 487 U.S. 879 (1988) 12
Christopher v. Mobil Oil Corp., 950 F.2d 1209 (5th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S.Ct. 68, 121 L.Ed.2d 35 (1992) ..... *passim*
City of St. Louis v. Department of Transp., 936 F.2d 1528 (8th Cir. 1991) 23
Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231 (4th Cir. 1991) 16, 22, 25
Deeming v. American Standard, Inc., 905 F.2d 1124 (7th Cir. 1990) 25
Drennan v. General Motors Corp., 977 F.2d 246 (6th Cir. 1992), *cert. denied*, No. 92-1607, 1993 WL 113336 (U.S. May 24, 1993) 13, 23
Felton v. Unisource Corp., 940 F.2d 503 (9th Cir. 1991) 22
Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989) ..... *passim*
Gavolik v. Continental Can Co., 812 F.2d 834 (3d Cir. 1987), *cert. denied*, 484 U.S. 979 (1987) 25
Hubbard v. EPA, 949 F.2d 453 (D.C. Cir. 1991) 12
Ingersoll-Rand Co. v. McClendon, —— U.S. ——, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990) 9, 14, 17, 22
Mertens v. Hewitt, No. 91-1671, 1993 WL 179274 (U.S., June 1, 1993) 12, 16
Mitchell v. Mobil Oil Corp., 896 F.2d 463 (10th Cir.), *cert. denied*, 498 U.S. 898, 111 S.Ct. 252, 112 L.Ed.2d 210 ..... 2, 8, 10-12
Primate Protection League v. Tulane, 500 U.S. ——, 111 S.Ct. 1700, 114 L.Ed.2d 134 (1991) 23
Safir v. Dole, 718 F.2d 475 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1206 (1984) 23

TABLE OF AUTHORITIES—Continued

	Page
Shawley v. Bethlehem Steel Corp., 784 F. Supp. 1200 (W.D. Pa. 1992)	19
Shawley v. Bethlehem Steel Corp., 989 F.2d 652 (1993)	19
Stanton v. Gulf Oil Corp., 792 F.2d 432 (4th Cir. 1986)	22
Tolle v. Carroll Touch, Inc., 977 F.2d 1129 (7th Cir. 1992)	13, 22, 25, 26
United States v. Burke, 504 U.S. ——, —— S.Ct. ——, 119 L.Ed.2d 34 (1992)	12
Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 93 S.Ct. 2469, 37 L.Ed.2d 207 (1973)	22
Woolsey v. Marion Laboratories, Inc., 934 F.2d 1452 (10th Cir. 1991)	13, 24, 25
CONSTITUTION, STATUTES AND OTHER AUTHORITIES:	
Article III of the U.S. Constitution	23
26 U.S.C. § 401(a)(4)	5
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1292(b)	9, 11
29 U.S.C. § 1001	4
29 U.S.C. § 1002(7)	2, 21
29 U.S.C. § 1132	2, 17, 26
29 U.S.C. § 1140	2, 9, 26
ERISA § 3(7)	*passim*
ERISA § 502	2, 13, 25, 26
ERISA § 502(a)(1)	13, 16, 24, 25, 26
ERISA § 502(a)(3)	13, 25
ERISA § 502(a)(3)(B)	12, 13, 16, 25, 26
ERISA § 502(a)(3)(e)	25
ERISA § 502(a)(1)(B)	25
ERISA § 502(d)(2)	12
ERISA § 510	*passim*
Retirement Equity Act of 1984, Pub. L. No. 98-397, § 302(d)(1), 98 Stat. 1426, 1451-52 (codified, as amended, 29 U.S.C. § 1001, Historical and Statutory Notes)	4

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, plaintiffs below, petition for a writ of certiorari to review the judgment below of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 983 F.2d 1528 (1993) and is reprinted in the appendix at 1a-23a.

The District Court's order, dated June 25, 1992, is not reported. It is reprinted in the appendix at 74a-79a.

RELATED CASES

Christopher v. Mobil Oil Corp., 950 F.2d 1209 (5th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S.Ct. 68, 121 L.Ed.2d 35 (1992). Reprinted in the appendix at 24a-48a.

Mitchell v. Mobil Oil Corp., 896 F.2d 463 (10th Cir. 1990), *cert. denied*, 498 U.S. 898, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990). Reprinted in the appendix at 49a-69a.

JURISDICTION

The Tenth Circuit's judgment in this case was entered on January 20, 1993. The petitioners here petitioned for rehearing and suggested rehearing *en banc*, which was denied by the Tenth Circuit on March 10, 1993. *See* Appendix at 72a-73a. This petition for writ of certiorari is filed within 90 days of the denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This petition primarily involves §§ 3(7), 502 and 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1002(7), 1132 and 1140. These provisions are reprinted in the appendix at 80a-88a.

STATEMENT OF THE CASE

At issue is whether the Court of Appeals for the Tenth Circuit erred in holding that former employees who received a lump sum payment of their accrued pension benefits are not "participants" and therefore do not have standing to sue under ERISA even if they prove: (a) that their employer's concealment of material facts about their pension rights rendered their consequent "early retirements" involuntary discharges in violation of ERISA § 510; and (b) that they were "participants" at the time of the alleged § 510 violation and but for the violation would still be "participants" earning and "eligible to receive" additional benefits under a defined-benefit plan.

The Tenth Circuit's decision in this case is contrary to a 1992 Fifth Circuit decision in a companion case, *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209 [24a-48a]. *Christopher* held that members of the same plaintiff class certified in this case, alleging the same facts and

asserting the same claims under ERISA, could establish standing to sue under ERISA as "participants." [42a-45a].

A. Factual Background.

As part of their compensation from Respondent Mobil Oil Corporation ("Mobil"), petitioners earned retirement benefits, including a pension under a defined-benefit retirement plan (the "Plan"). Until 1977, such pensions were paid in the form of monthly annuities. But in 1977, Mobil amended the Plan to allow employees to take their pensions in a lump sum, reduced to present value by a 5% discount rate. To qualify for this lump sum option, the retiring employee had to have $250,000 in accrued pension or a personal net worth, exclusive of his Mobil pension, exceeding that figure.

1. *The July 1984 Plan Amendment.*

By 1983, the 5% discount rate had made the lump sum benefit far more valuable—about 40% more valuable —than the annuity benefit. Also, over time, a majority of Mobil's employees had achieved eligibility for the lump sum under the $250,000 requirement, and Mobil's actuaries forecasted that eligibility for the lump sum would soon become universal. Mobil thus contemplated changes to the discount rate and to the eligibility test. However, in 1983, Mobil was informed by its advisors that any increase in the $250,000 test would likely not be approved by the IRS, as it would discriminate in favor of highly compensated employees.

Since 1982, Mobil had been reducing its work force using lawful but expensive programs with economic incentives to induce early retirements. In early 1984, Mobil's Executive Committee realized that if a proposal to increase prospectively the eligibility test for the lump sum benefit were announced, together with a transition period or "window" during which employees could retire with the lump sum under the $250,000 test, many em-

ployees would take "early retirement" to secure the more valuable lump sum. This represented a possible new approach to reducing Mobil's work force which would result in enormous savings.

By May 1984, however, Mobil learned that Congress was likely to pass an amendment to ERISA that would prevent "cutbacks" in defined benefits, including "optional" forms of benefits such as Mobil's lump sum option. The proposed amendment, eventually enacted as part of the Retirement Equity Act ("REA"), would not prohibit such "cutbacks" if made before July 30, 1984. Retirement Equity Act of 1984, Pub. L. No. 98-397, § 302(d)(1), 98 Stat. 1426, 1451-52 (codified, as amended, 29 U.S.C. § 1001, Historical and Statutory Notes).

Mobil acted quickly. On June 13, 1984, it adopted and on July 2, 1984, it announced a proposed Plan amendment: (a) increasing the discount factor from 5% to 9.5% for benefits accrued after February 1, 1985; and (b) increasing the lump sum eligibility "threshold" from $250,000 to $450,000, also effective February 1, 1985, to be increased thereafter by the consumer price index. The change in the threshold was not made prospective. Once the Plan amendment became effective, the new eligibility threshold would apply to all retirees and with respect to the entirety of their pensions.

Ostensibly as a matter of fairness, Mobil also announced on July 2, 1984, a special six-month "window" retirement program. Employees 55 years of age or older could take their pensions in a lump sum under the $250,000 test—but only if they retired by January 1, 1985. As part of this "window" program, Mobil relaxed the requirements for electing the lump sum option.

At the time Mobil announced the Plan amendment and the "window" program, it informed its employees that the proposed amendment was "subject to IRS approval"—that is, an IRS determination that the Plan, as amended,

would continue to meet IRS criteria for favorable tax treatment. The employees were led to believe that such IRS approval would be routinely given.

2. ***The September 1984 Plan Amendment.***

On July 16, 1984, Mobil submitted its application for a determination letter to the IRS. The chief concern was whether the new $450,000 threshold would "discriminate in favor of highly compensated employees" in violation of 26 U.S.C. § 401(a)(4). In September 1984, the IRS agent reviewing the proposed amendment informed Mobil that the amendment would not be approved because it would indeed favor Mobil's "highly paid executives."

Although Mobil informed its Executive Committee of the IRS's response, it did not inform its rank and file. Instead, in late September, Mobil revised the proposed amendment to include a provision under which each employee could apply for a waiver of the $450,000 threshold. This new Plan amendment, submitted to the IRS in October 1984, formally reserved to Mobil the "sole discretion" to grant such waivers "in individual cases for valid cause shown." However, Mobil has admitted that the purpose and intended operation of the waiver clause was to meet the IRS's objections and to prevent "statistical discrimination" in favor of highly compensated employees. Since eligibility for the lump sum option under the $450,000 test was already virtually universal among Mobil's highly compensated employees—a fact Mobil's Executive Committee had determined before announcing the first Plan amendment—the waiver clause therefore had the practical effect of negating the $450,000 threshold.

3. ***Mobil's Misrepresentations and Concealments.***

The IRS informally approved the new Plan amendment, with the waiver clause, in October 1984. However, Mobil again made no announcement to its rank and file. It did not disclose that the IRS had refused to approve the Plan amendment annouced in July or that a new Plan

amendment with the waiver clause had been adopted in September—after the July 30, 1984 effective date of the REA. Nor did it disclose that employees would have the right to apply for a waiver of the $450,000 threshold or that the purpose of the waiver clause was to prevent statistical discrimination in favor of highly compensated employees, virtually all of whom already qualified for the lump sum under the $450,000 test.

In fact, Mobil affirmatively misled its employees considering retirement under the "window" program. Several employees, including some of the petitioners here, asked their respective employee relations departments about possible exceptions to the $450,000 threshold. They were consistently told that no exceptions were possible.

In October 1984, Mobil prepared two memoranda concerning the IRS's approval of the new Plan amendment. The one sent to Mobil's Executive Commitee correctly described the amendment, as adopted the previous month, including the required waiver provision. The other, addressed to Mobil's employee relations managers throughout the country, described only the Plan amendment announced on July 2, 1984.

On November 12, 1984, one of Mobil's executives prepared a "confidential memorandum" concerning plans for administering the new waiver "option." This document discusses "adverse comments" to the IRS about the July 2, 1984 announcement made by employees who were considering early retirement under the "window" program. The IRS had responded to the employees, explaining only that the amendment "did not adversely affect the qualification of the Plan." The internal Mobil document expresses relief that the IRS had made "no mention of the additional amendment required by the IRS [*i.e.*, the waiver clause]."

Mobil announced the IRS's approval of the Plan amendment to its employees on December 21, 1984—just ten days before the end of the "window" program. The an-

nouncement specifically referred to the July 2, 1984 announcement and implied that the IRS had approved the Plan amendment as announced in July. The December announcement did not mention the required waiver clause or that the Plan amendment actually adopted by Mobil was not made until after July 30, 1984.

On January 1, 1985, more than 1,000 Mobil employees retired under the "window" program, on the average more than seven years before the normal retirement age of 65. Many forfeited their highest earning years. All forfeited their employment benefits, including the accrual of additional retirement benefits. Mobil, on the other hand, realized an enormous net savings from its "lump sum strategy": the reduction in Mobil's work force from the exodus of "window" retirees saved Mobil nearly $300 million in salaries and other benefits.

4. Mobil's Violations of ERISA § 510.

Petitioners and their fellow "window retirees" left Mobil on January 1, 1985, believing that the Plan amendment announced by Mobil the previous July had been approved by the IRS and without knowing that the true Plan amendment had been made in September. Petitioners "retired" unaware of their right, under the Plan amendment actually made, to apply for a waiver of the $450,000 threshold.

Had petitioners known the true facts, they, through unions and otherwise, would have learned that their rights to the lump sum benefit under the $250,000 threshold had been "grandfathered" in by the REA. In addition, had petitioners known of their right to apply for a waiver of the new threshold, they would have done so instead of forfeiting their jobs—especially if they had been informed about the purpose and intended operation of the waiver clause.

Thus, plaintiffs alleged below that Mobil fraudulently discharged them for and upon the exercise of their rights

under ERISA and an ERISA plan, including the right to the lump sum benefit under the $250,000 test and the right to be free from the "cutback" of that benefit—in violation of ERISA § 510. Plaintiffs also alleged that Mobil discharged them with the specific intent of interfering with their attainment of a right under an ERISA plan, namely the right to apply for a waiver of the $450,000 requirement, also in violation of § 510.

B. The Proceedings Below.

Petitioners did not learn of Mobil's fraudulent conduct until late 1988, as a result of discovery in a suit brought by one of the "window retirees" who unsuccessfully challenged the Plan amendment announced in July 1984.[1]

This action was commenced in December 1988. It was certified as a class action in 1992, as to two claims under the Age Discrimination in Employment Act ("ADEA") and two claims for fraudulent discharge and discrimination in violation of ERISA § 510.[2]

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[1] *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir.), *cert. denied*, 498 U.S. 898, 111 S.Ct. 252 (1990) [49a-69a].

[2] Originally, state-law claims for fraud and related torts were also asserted, but the District Court declined to exercise pendent jurisdiction over those claims and dismissed them without prejudice. Those claims were reasserted by the same plaintiff class (petitioners here) in state court in Colorado. The state district court eventually ruled that the state-law claims were preempted by ERISA. Because of uncertainty as to whether plaintiffs may sue under ERISA—in light of the conflicting holdings in *Christoper, supra*, and in this case—plaintiffs have appealed the dismissal of their state-law claims to the Court of Appeals for the State of Colorado. Nos. 92 CA 1395 and 93 CA 0062 (consolidated).

Also, in March 1993, the District Court in this case denied Mobil's motion for summary judgment on plaintiffs' ADEA claims, holding that although ADEA claims based on the July 2, 1984 announcement were time-barred, claims based on concealment of the Plan amendment actually adopted in September 1984 are not time-barred, if the jury finds that plaintiffs did not discover and could

Shortly after the case was filed, 70 members of the then-putative class filed separate actions in the U.S. District Court for the Eastern District of Texas. One of those cases is *Christopher*, mentioned earlier.

In 1990, the District Court in *Christopher* dismissed all claims on various grounds. As pertinent here, the Court held that the *Christopher* plaintiffs were not "participants" under ERISA and thus could not sue for any alleged violations of ERISA. Since they had received all their vested benefits through the date of retirement and could no longer establish a "reasonable expectation of returning to covered employment," they could not meet either of the tests for standing to sue by former employees derived from *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989).

On appeal the Fifth Circuit reversed, holding that *Firestone* did not restrict standing under ERISA in the manner urged by Mobil:

> We are not convinced that *Firestone* can be read to reduce the standing question to a straightforward formula applicable in all cases. This seems particularly so in cases involving allegations of discharge. ERISA § 510, 29 U.S.C. § 1140, makes it unlawful for an employer to "discharge, fine, suspend, expel, discipline, or discriminate against a participant" for exercising a right provided by ERISA or "for the purpose of interfering with the attainment" of a right provided by ERISA. The Supreme Court's recent *McClendon* decision held that this provision would foreclose the development of any state law cause of action for wrongful termination to prevent vesting of pension benefits. *Ingersoll-Rand Co. v. McClendon*, —— U.S. ——, 111 S.Ct. 478, 485, 112 L.Ed.2d 474 (1990). The implication of the Court's holding that the discharged employee must look solely to

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not reasonably have discovered those claims until 1988. That ruling is now on interlocutory appeal to the Tenth Circuit, pursuant to 28 U.S.C. § 1292(b). (No. 93-555, Order of May 5, 1993.)

> ERISA for his remedy is that he would have standing to do so. Nevertheless, it is not readily apparent that he would have standing under the construction of *Firestone* urged by Mobil; he would be a former employee lacking both a claim for vested benefits and (unless he requested reinstatement) a reasonable expectation of returning to covered employment. It would be unusual if in that situation his ability to assert a claim at all turned on whether or not his requested relief included reinstatement; it would seem more logical to say that but for the employer's conduct alleged to be in violation of ERISA, the employee *would* be a current employee with a reasonable expectation of receiving benefits, and the employer should not be able through its own malfeasance to defeat the employee's standing. *Cf. Amalgamated Clothing and Textile Workers v. Murdock*, 861 F.2d 1406, 1418 (9th Cir. 1988).

[44a-45a, emphasis in original]. The Fifth Circuit recognized that a "discharge to prevent vesting of benefits in violation of Section 510 by definition must be challenged by someone other than a current employee or someone with a claim to vested benefits" [46a]. Where the alleged violation of ERISA itself causes the employee's loss of status as an ERISA "participant," the employee's standing to sue for the violation cannot be defeated by the employer paying him all accrued benefits and informing him he has no expectation of reinstatement [46a-47a].

Mobil's Petition for a Writ of Certiorari to review the ERISA standing decision in *Christopher* was denied on October 5, 1992. —— U.S. ——, 113 S.Ct. 68, 121 L. Ed.2d 35 (1992).

Notwithstanding the *Christopher* holding, Mobil moved in this case for summary judgment on plaintiffs' ERISA § 510 claims. It urged the District Court to reject *Christopher* and to follow the narrower reading of *Firestone* which the Tenth Circuit had arguably adopted in *Mitchell v. Mobil Oil Corp.* [67a-69a] and which the District

Court had followed in *Christopher*. The District Court denied Mobil's motion but certified its order for interlocutory appeal [70a-71a]. The Tenth Circuit granted permission to appeal under 28 U.S.C. § 1292(b).

The Tenth Circuit reversed the District Court and directed entry of judgment for Mobil on plaintiffs' § 510 claims. In doing so, the Tenth Circuit applied a "bright line" test for ERISA standing: an employee who has received all benefits earned through the date of his discharge has no standing to sue under ERISA—even if his discharge was in interference with his rights under ERISA or he was discharged for or upon the exercise of such rights:

> [O]nly former employees who are or "may become eligible to receive a benefit of any type from an employee benefit plan" satisfy the participant requirement of ERISA. That definition includes "former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits." *Firestone*, 489 U.S. at 117. . . .
>
> We held in *Mitchell* that that definition simply "excludes . . . former employees who have received a lump-sum payment of all their vested benefits because 'these erstwhile participants have already received the full extent of their benefits and are no longer eligible to receive future payments.' " *Mitchell*, 896 F.2d at 474. . . .
>
> The crucial point is the receipt of the "full extent" of their vested benefits. That is equally true of plaintiffs in this case. They too seek a damage award based upon their allegedly fraudulent discharge from their jobs; they do not seek "vested benefits improperly withheld."
>
> Plaintiffs invoke the *Christopher* court's analysis in an attempt to avoid the breadth of that holding in *Mitchell*. Thus, they argue that the fact that Mobil fraudulently induced them to retire by hiding from

> them the existence of the waiver provision and certain facts which they needed to be able to properly evaluate the impact of the REA on their pension rights, somehow renders our *Mitchell* holding inapplicable to them. We disagree. The existence of fraud is irrelevant to the linchpin of our *Mitchell* holding—the receipt of all benefits to which the employee is entitled under the plan.

[14a, 15a, 16a, some citations omitted]. Plaintiffs' petition for rehearing and suggestion for rehearing *en banc* was denied on March 10, 1993 [72a-73a].[3]

REASONS FOR GRANTING THE WRIT

On identical facts alleged and identical claims asserted by different members of the same plaintiff class, the Tenth Circuit has rendered a decision on ERISA

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[3] The Tenth Circuit's characterization of the relief petitioners sought below as "damages" is imprecise in a way significant to the issues upon which this Court's review is now sought. The Complaint below prays for:

> [A]ll equitable and other relief as may be necessary to redress plaintiffs' rights asserted under [the § 510] claims and to redress the violations of law alleged in those claims, including an order compelling reinstatement or equitable reinstatement of each plaintiff's employment at a status and salary commensurate with his tenure as though his employment with Mobil were uninterrupted and with all previously elected retirement benefits, as well as restitution for all lost wages and salaries, benefits, saving accounts benefits, both past and future, as well as all other compensatory, consequential, and incidental measures of restitution, together with interest, attorneys' fees, costs, expert witness fees, punitive and exemplary damages.

Although some of that relief may constitute "damages at law," not recoverable under § 502(a)(3)(B) of ERISA, the core of the relief sought is equitable relief, which is recoverable under that section. *Mertens v. Hewitt*, No. 91-1671, 1993 WL 179274 at *3-6 (U.S. June 1, 1993); *United States v. Burke*, 504 U.S. ——, —— S.Ct. ——, 119 L.Ed.2d 34, 44-46 (1992); *Bowen v. Massachusetts*, 487 U.S. 879 (1988); *see also Hubbard v. EPA*, 949 F.2d 453, 462 (D.C. Cir. 1991); ERISA § 502(d)(2) [83a].

standing that is in direct conflict with the decision of the Fifth Circuit in *Christopher*. The Tenth Circuit held that the *Christopher* court's analysis of ERISA standing "amounts to the kind of analysis rejected" by this Court in *Firestone*. In so concluding the Tenth Circuit misconstrued *Firestone* and established a test for standing that effectively reads out of ERISA the entirety of § 510.

The Tenth Circuit has adopted a view that ERISA protects benefits only in the "direct" sense of allowing suits for earned but unpaid benefits—not suits for interference with the employment relationship from which the benefits protected by ERISA arise. This conflicts with the Tenth Circuit's own precedent recognizing that § 510 "was designed to protect the employment relationship which gives rise to an individual's pension rights." *Woolsey v. Marion Laboratories, Inc.*, 934 F.2d 1452, 1461 (10th Cir. 1991).

The Tenth Circuit noted that under § 502, suit may be brought only " 'by a participant . . . to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan' " [13a, quoting § 502(a)(1)]. The court emphasized the "present tense" of this language in rejecting the proposition that standing to sue under ERISA must be determined as of the time of the alleged violation. However, the court ignored § 502(a)(3), which explicitly recognizes that a "participant" (which includes at least some former employees) may sue to "redress" a past violation of rights under a plan or under ERISA itself.

In effect, the court held that § 510 cannot be enforced under § 502(a)(3)(B). In this respect, the Tenth Circuit's decision is at odds with decisions from at least three other circuits besides the Fifth. *See, especially, Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129 (7th Cir. 1992); *see also Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992), *cert. denied*, No. 92-1607, 1993 WL

113336 (U.S. May 24, 1993); *Berger v. Edgewater Steel Co.*, 911 F.2d 911 (3d Cir. 1990), *cert. denied*, ——— U.S. ———, 111 S.Ct. 1310, 113 L.Ed.2d 244 (1991).

Finally, it is noteworthy that under the Tenth Circuit's decision, the plaintiff in *Ingersoll-Rand*, whose claim for violation of ERISA § 510 was carefully delineated by this Court, would lack standing to sue for that violation. This cannot be. This circumstance does, however, underscore the fundamental nature of the issues presented here. They require a determination of the essential requirements for standing to sue under ERISA, the scope of ERISA's protection of the employment relationship, and which specific provisions of ERISA may be used to enforce § 510.

The serious inter- and intra-circuit conflicts on those issues and the need to harmonize the circuits' varying applications of *Firestone* in § 510 cases merit this Court's attention.

I. THE TENTH CIRCUIT MISCONSTRUED THIS COURT'S DECISION IN *FIRESTONE* AND, AS A CONSEQUENCE, EFFECTIVELY READ § 510 OUT OF ERISA.

ERISA § 3(7) defines "participant" to include "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan . . ." [80a]. As to former employees, *Firestone* construed this definition to include those former employees "who have a 'colorable claim' to vested benefits." 489 U.S. at 117. Additionally, *Firestone* holds that "[i]n order to establish that he 'may become eligible for benefits,' a claimant must have a colorable claim that (1) he will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." 489 U.S. at 117-18.

The Tenth Circuit has taken this language to mean that an employee who has already met eligibility requirements for a benefit, *i.e.*, has vested in the benefit, and

then receives all amounts of the benefit accrued through the date of his discharge, has no "colorable claim for vested benefits" within the meaning of *Firestone*. If he brings suit under § 510 seeking, *inter alia*, to recover for amounts of the benefit he was precluded from earning in the future, he lacks standing, unless he can demonstrate a "reasonable expectation of returning to covered employment," the other standing possibility recognized under *Firestone*.

Setting that possibility aside for a moment, the Tenth Circuit's construction of *Firestone* does not comport with the text of ERISA or this Court's reasoning in *Firestone*. A plaintiff who was a current employee when he was allegedly discharged in violation of § 510 was obviously a "participant" at the time of the discharge. If he commenced suit before the discharge, for example seeking injunctive relief, he would be a participant because he would then be or would in the future become "eligible to receive a benefit of any type."

But what if at the time of threatened discharge an employee had already met all requirements of eligibility for the benefit (in the sense employed by the Tenth Circuit, *i.e.*, he was already "qualified" for the benefit) and had merely been accruing increasing amounts of the benefit. This would be a typical situation in the case of a health plan benefit. If the employee had been receiving benefits under the health plan, as earned, and was threatened with discharge for past utilization of the benefits and to prevent continued utilization, the discharge would unquestionably violate § 510, and presumably the current employee seeking to enjoin such discharge would have standing to sue—even though he had already met all qualifications for receiving the health plan benefits and wanted to prevent a termination motivated by the employer's desire to prevent continued "exercise" of the right to, or the accrual of, the benefits.

There is nothing in § 3(7), § 510 or elsewhere in ERISA suggesting that the employee threatened with

such a termination must sue *before* his discharge—or else lose forever his standing to sue for the § 510 violation. As already mentioned, the language of § 502 (a)(3)(B) contemplates "redress" for such violations and is not constrained by the "present tense" which the Tenth Circuit finds in § 502(a)(1). Moreover, this Court's recent decision in *Mertens* confirms that the employee can sue under § 502(a)(3)(B) either for an injunction before the discharge or for restitution afterwards.

This inexorably leads to the conclusion that the phrase "eligible to receive a benefit of any type" in § 3(7) is not limited to persons who seek to establish their eligibility in the first instance for a particular ERISA benefit. It must also embrace persons who have already met the requirements for the benefit and who are suing because they have been prevented from accruing additional increments of the benefit. *See, e.g., Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 236 (4th Cir. 1991) ("§ 510 gives fully vested employees a cause of action against an employer who acts to prevent accrual of *additional* benefits") (emphasis in original).

Thus, the more reasoned construction of *Firestone's* "colorable claim for vested benefits" test for standing recognizes that a discharged employee—who received all accrued benefits earned through the date of discharge—still possesses a "colorable claim for vested benefits" if he makes a colorable showing that "he will prevail in a suit for benefits" he was precluded from earning by virtue of his discharge.

Alternatively, such a former employee may be said to be suing upon a "colorable claim . . . that eligibility requirements will be fulfilled in the future," because one of the essential requirements for eligibility for the *unearned* benefits, *i.e.*, increased accruals, for which he seeks restitution, is continued employment. Eligibility for each dollar of an accruing benefit, such as a pension, depends in part on the employee working the days necessary to earn each such dollar of pension.

Consequently, a former employee *is* a "participant" under § 3(7) if he has a "colorable claim for vested benefits" that he was wrongfully precluded from earning —whether he has not yet qualified for the benefits or whether he has previously qualified and has accrued some of such benefits but has been prevented from accruing more.

Indeed, no other construction of § 3(7) or its interpretation in *Firestone* can be harmonized with the text of § 510. Under § 510, it is unlawful for an employer "to discharge . . . or discriminate against a participant . . . for exercising any right to which he is entitled . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled . . ." under an ERISA plan or ERISA itself. 29 U.S.C. § 1132. If the employee is discharged for his prior exercise of the right, he may well have received the entirety of the benefit accrued through the date of discharge. Yet, under the Tenth Circuit's construction of *Firestone*, he would no longer have a "colorable claim for vested benefits," but only a claim for "damages" [16a], *i.e.*, in the Tenth Circuit's view, the money equivalent of the benefits plaintiff was precluded from earning.

Similarly, an employee discharged to prevent his attainment of a vested benefit, as in *Ingersoll-Rand*, would also have no standing to sue under the Tenth Circuit's formulation. This plaintiff has received all accrued and earned benefits, if any, in which he had vested prior to the date of discharge, and the fact that he was precluded by his employer's misconduct from vesting in one or more other benefits (or accruing more of the benefits in which he had vested) is, according to the Tenth Circuit, irrelevant to his standing.

Neither the language of § 3(7) nor *Firestone's* explication of that language in the context of "former employees" can have the limited scope which the Tenth Circuit attached to them. The necessary consequence of

the Tenth Circuit's construction is to leave all or virtually all former employees who have claims under § 510 with no standing to assert those claims. The Court should not allow such precedent to persist and potentially spread to other circuits.

II. THE TENTH CIRCUIT ALSO MISCONSTRUED THE "REASONABLE EXPECTATION OF RETURNING TO COVERED EMPLOYMENT" PRONG OF *FIRESTONE*.

In *Firestone*, this Court also recognized that a former employee has standing to sue under ERISA if he has a "reasonable expectation of returning to covered employment . . . ." 489 U.S. at 117. The Tenth Circuit interpreted this prong in the following terms:

> We hold as a matter of law that a reasonable expectation of returning to covered employment cannot encompass the undisputed situation here, where plaintiffs retired, received all their vested benefits, did not ask their employer for reinstatement and can point to nothing suggesting that Mobil will, should or must reinstate them, but instead filed suit seeking reinstatement to commence accruing benefits anew.

[19a]. Although the court tells us what does not constitute a "reasonable expectation of returning to covered employment," it does not tell us what would suffice. In contrast, the *Christopher* court held that a judicial claim, presumably a "colorable claim," for reinstatement would meet this test [42a-45a].

The essential requirement of § 3(7)—that a "participant" be one who "may become eligible for a benefit"—was construed in *Firestone* as requiring that a former employee "have a colorable claim that (1) he will prevail in a suit for benefits or that (2) eligibility requirements will be fulfilled in the future." 489 U.S. at 117-18. Those alternative criteria apparently apply to both the "colorable claim for vested benefits" and the "reasonable

expectation of returning to covered employment" prongs of *Firestone*.

On the second prong, the Tenth Circuit adopted the holding in *Shawley v. Bethlehem Steel Corp.*, 784 F. Supp. 1200, 1205 (W.D. Pa. 1992), which precluded standing to sue for an alleged violation of ERISA because the plaintiffs " 'had no statutory right to be rehired, nor any contractual right to be rehired . . . .' " [18a-19a]. The *Shawley* court concluded that for " 'a reasonable expectation of returning to employment to exist, there must be a claim of right on the part of the former employee to return to work' " [19a].[4]

But a colorable claim for wrongful discharge in violation of § 510 *is* a claim based on a "statutory right to be rehired." The fact that an alternative remedy, such as restitution, may ultimately be elected by the plaintiff does not change the nature of the claim or the statutory right on which it is based. Accordingly, even under the test adopted by the Tenth Circuit, the plaintiffs in this case and in any other case in which a *colorable* claim for violation of § 510 is asserted have standing to sue to "redress" such violation.

A former employee seeking reinstatement who has a colorable claim for violation of § 510—thus meeting *Christopher's* conception of the second prong of *Firestone*—necessarily has a "colorable claim that he will prevail on a suit for benefits" that he was precluded from earning by virtue of the discharge. Similarly, an employee

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[4] Although *Shawley* was affirmed by the Third Circuit, *Shawley v. Bethlehem Steel Corp.*, 989 F.2d 652 (1993), the court declined "to hold that former employees may never have a 'reasonable expectation' of reemployment in the absence of a contractual or statutory entitlement to reemployment." *Id.* at 657. Moreover, the Third Circuit, analyzing *Christopher* in detail, held that "even under a 'but-for' analysis, plaintiffs would lack standing to sue under ERISA." *Id.* at 659. Thus, the Tenth Circuit's reliance on the district court's opinion in *Shawley* for an approach contradicting *Christopher* is now dubious.

discharged before he could attain eligibility for a particular benefit (or for a particular increment of an accruing benefit) and who has a colorable claim under § 510 also necessarily has a "colorable claim that eligibility requirements will be fulfilled in the future." Thus, the *Christopher* court's conception of this second prong of *Firestone* is consistent with *Firestone*.

On the other hand, the Tenth Circuit's formulation creates anomolous results which neither Congress nor the *Firestone* court could have intended: an employee wrongfully discharged by a "going concern" with a collective bargaining agreement containing a "contractual right to be rehired" might have standing to sue under ERISA, while an employee whose employer was in a reduction-in-force mode and/or had no contractual obligation to rehire would not have standing.

Moreover, as recognized by the *Christopher* court, the plaintiff's standing to sue for a wrongful discharge should not depend at all on whether he actually *seeks* "reinstatement" as his remedy. An employee with a "colorable claim" for reinstatement should be deemed a former employee with a "reasonable expectation of returning to covered employment" even if for practical reasons he ultimately elects an equitable equivalent of reinstatement —*e.g.*, restitution. This Court should confirm that basic but important proposition, as consistent with *Firestone* and § 3(7).

III. THE FIFTH CIRCUIT'S DECISION IN *CHRISTOPHER* IS CONSISTENT WITH *FIRESTONE* AND DOES HARMONIZE THE PERTINENT PROVISIONS OF ERISA.

In rejecting the *Christopher* reasoning, the Tenth Circuit stated:

> To say that but for Mobil's conduct, plaintiffs would have had standing is to admit that they lack standing and to allow those who merely *claim* to be participants to be deemed as such.

[17a, emphasis in original]. This has reference to the following language in *Firestone*:

> To say that a 'participant' is any person who claims to be one begs the question of who is a 'participant' and renders the definition in § 1002(7) superfluous.

489 U.S. at 117. But the Tenth Circuit misapprehended the import of this passage in *Firestone* as well.

Every plaintiff in every case must "claim" standing to sue, and any defendant is free to contest the claim. Of course, the mere claim of standing does not establish standing, and where disputed, standing must be proven. The *Christopher* court did not require less: "we cannot now foreclose the possibility that [plaintiffs] could prove facts that would create standing for them . . ." [48a].

In *Firestone*, the former employees sought information about plans in which they might or might not have been "participants" at the time of their requests. The Third Circuit held that by merely claiming to be "participants," they were entitled to the information. In other words, the substantive issue under ERISA—Firestone's violation of ERISA's disclosure provisions—would have been, in effect, established by a mere *allegation* that the plaintiff was a plan participant. This Court rejected that approach.

But in doing so, this Court did not suggest that a person who unquestionably was in current employment at the time of an alleged violation of ERISA cannot establish his status as a "participant" for purposes of suit merely because he is a former employee at the time of suit, alleges or claims "participant" status, and seeks to prove facts that would meet the requirements of § 3(7). If he shows that he has a "colorable claim for vested benefits" which he was precluded from earning, then he possesses standing to sue.

The flaw in the Tenth Circuit's criticism of *Christopher* is underscored by the Tenth Circuit's reliance on cases

where an employee who never, in fact, was a "participant" in the ERISA plan at issue claims that, because of some misconduct of his employer, he should be treated as if he had *become* a "participant." *See, e.g., Boren v. Southwestern Bell Tel. Co.*, 933 F.2d 891, 893 (10th Cir. 1991); *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986).

Although it may be said that a person who was never a "participant" could never have a "colorable claim" to a benefit in which he had actually vested, § 510 obviously contemplates suit by an employee who was precluded from vesting in the first instance. The plaintiff in *Ingersoll-Rand* was precisely in that situation. Thus, some of the circuits have recognized that if a plaintiff not only claims but proves that he would have been a participant in a particular ERISA plan or benefit, but was wrongfully prevented from achieving that status by virtue of his employer's violation of § 510, he does have standing to sue for that violation. *See, e.g., Christopher* [24a-48a]; *Tolle*, 977 F.2d 1129 (7th Cir. 1992); *Conkwright*, 933 F.2d 231 (4th Cir. 1991); *Felton v. Unisource Corp.*, 940 F.2d 503 (9th Cir. 1991); *Berger*, 911 F.2d 911 (3d Cir. 1990).[5]

The essential point is that *Christopher's* recognition of what the Tenth Circuit characterizes as "but for" standing does not run afoul of *Firestone* or any other principle of standing. The plaintiffs do not achieve standing merely by *claiming* that they are participants, but rather by claiming and proving that but for the violation of ERISA itself, they would be current employees either achieving eligibility for a benefit or accruing additional benefits for which they were already qualified. This Court's pro-

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[5] "It is well established that" a court's "task in interpreting separate provisions of a single Act is to give the Act 'the most harmonious, comprehensive meaning possible' in light of the legislative policy and purpose." *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 631-32, 93 S.Ct. 2469, 37 L.Ed.2d 207 (1973).

nouncement of that rule is essential to the proper application of ERISA by the lower courts.

IV. THE TENTH CIRCUIT ERRED FUNDAMENTALLY IN REJECTING THE PROPOSITION THAT STATUTORY STANDING TO SUE UNDER ERISA SHOULD BE DETERMINED AS OF THE TIME OF THE ALLEGED VIOLATION, RATHER THAN AS OF THE TIME OF SUIT OR TRIAL OR SOME OTHER UNSPECIFIED TIME.

Standing to sue under Article III of the U.S. Constitution, implicating as it does issues of justiciability and related concerns, may require that the plaintiff satisfy Article III requirements at the time suit is commenced and thereafter. *See, e.g., Safir v. Dole,* 718 F.2d 475, 481 (D.C. Cir. 1983), *cert. denied,* 467 U.S. 1206 (1984); *but see City of St. Louis v. Department of Transp.*, 936 F.2d 1528, 1532 (8th Cir. 1991) ("in the context of standing, it is the nonfrivolous claims of a party that are determinative, not whether the party can sustain those claims by proof on the merits"). However, there is no compelling reason to apply that principle to statutory standing. *See Primate Protection League v. Tulane*, 500 U.S. ——, 111 S.Ct. 1700, 114 L.Ed.2d 134, 143 (1991) ("standing is gauged by the specific common-law, statutory or constitutional claims that a party presents").

The *Christopher* court's analysis implicitly recognizes, or at least is consistent with, the notion that "participant" status, for determining standing to sue, should be determined as of the time of the alleged ERISA violation. ERISA § 510 prohibits the discharge of, or discrimination against, "participants," and there is nothing in ERISA's enforcement sections which requires that the plaintiff has maintained his "participant" status *after* the violation and throughout the pendency of his action.

In *Drennan*, 977 F.2d 246, 250 (6th Cir. 1992)—a case bearing a striking resemblance to this one—

plaintiffs proceeded on a breach of fiduciary duty rather than a § 510 theory to remedy their wrongful discharges, allegedly procured by fraud. (That difference in legal theory would seem to have no significance to the issue of standing.) The Sixth Circuit held that the former employees had standing to sue not because they were "participants" at the time of suit, but because they had been eligible to participate in certain benefits "at the time the asserted" violation of ERISA occurred. *Id.* The court rejected the argument that "the pronouncements of *Firestone* . . . limited ERISA standing to employees with vested employee benefits." *Id.* The standing of employees claiming a violation of ERISA which prevented them from receiving benefits, whether or not vested, was determined as of the time of the alleged violation and was based on the assertion of a colorable claim for benefits which the claimants had been prevented from earning.

Given the inconsistencies between *Christopher* and this case and the further inconsistencies among the circuits on an issue of such a fundamental character, the guidance of this Court is needed and appropriate. The Court should determine whether statutory standing under ERISA is to be determined as of the time of the alleged violation of ERISA or at some other time.

V. THE TENTH CIRCUIT ERRED FUNDAMENTALLY IN LIMITING ERISA TO THE DIRECT PROTECTION OF BENEFITS AND BY HOLDING THAT § 510 OF ERISA IS ENFORCEABLE ONLY UNDER § 502(a)(1).

The Tenth Circuit expressed concern that "ERISA's goal of protecting [employment] benefits from interference does not transform ERISA's statutory scheme into a federal job protection scheme where those benefits are fully paid out, or create a federal cause of action for wrongful discharge" [22a, note omitted]. In its commitment to avoid that result, the Tenth Circuit ignored its prior construction of § 510 in *Woolsey*, 934 F.2d at

1461, and disregarded the enforcement provisions contained in § 502(a)(3).

Whether prudent or not, Congress chose by enacting § 510 to provide not merely for direct, "contractual" claims for benefits wrongfully withheld, but for claims to enjoin or redress employer interference with ERISA benefits as well. *See, e.g., Woolsey*, 934 F.2d 1452 (10th Cir. 1991); *Conkwright*, 933 F.2d 231 (4th Cir. 1991); *Deeming v. American Standard, Inc.*, 905 F.2d 1124, 1127 (7th Cir. 1990); *Gavolik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987), *cert. denied*, 484 U.S. 979 (1987). Thus, the Tenth Circuit fundamentally erred in construing ERISA's protections as ending whenever benefits actually earned are fully paid. ERISA also protects the employee's interest in benefits he was wrongfully prevented from earning.

The Tenth Circuit's error in this respect is exemplified by its analysis of ERISA's enforcement provisions. The court analyzed only § 502(a)(1), the "recovery of benefits" provision, which may have no application in a § 510 case. The court ignored § 502(a)(3)(B).

In *Tolle*, 977 F.2d at 1133-34 (7th Cir. 1992), the court was confronted with the issue of when a § 510 claim accrues, and to resolve the issue it turned to the enforcement provisions of § 502:

> A Section 510 claim is made enforceable through § 502(a)(3) and (e) of ERISA, 29 U.S.C. § 502(a)(3)(e). Section 510, unlike § 502(a)(1)(B), is not concerned with whether a defendant complied with the contractual terms of an employee benefit plan. Rather, the emphasis of a § 510 claim is to prevent persons and entities from taking actions which might cut off or interfere with the participant's ability to collect present or future benefits or which punish a participant for exercising his or her rights under an employee benefit plan. . . . The difference between enforcing the terms of the plan and assuring

> that parties do not somehow impinge on current or future rights under employee benefit plans may seem subtle at first glance, but upon a close examination it becomes clear that the distinction is great. In order to enforce the terms of the plan under § 502, the participant must first qualify for the benefits provided in that plan. *See* 29 U.S.C. § 1132. Rather than concerning itself with these qualifications, one of the actions which § 510 makes unlawful is the interference with the participant's ability to meet these qualifications in the first instance. *See* 29 U.S.C. § 1140.

The Seventh Circuit then held that "§ 510's express language provides that a defendant can be liable for unlawful interference *before* the participant becomes entitled to benefits under the terms of the plan." 977 F.2d at 1139 (emphasis added).

Not only is *Tolle* fundamentally at odds with the decision in this case, *Tolle* recognizes that ERISA is not concerned merely with the "direct" protection of vested benefits. This strikes at the heart of the Tenth Circuit's limiting construction of *Firestone*, which mandates that a former employee suing under § 510 has no standing to sue if he has received all benefits earned through the date of his discharge. *Tolle* also strikes at the heart of the Tenth Circuit's "present tense" analysis, which is premised on the view that § 510 claims are enforceable under § 502 (a)(1) and only under that section. Under § 502 (a)(3)(B), a former employee with a colorable claim for a wrongful discharge which prevented him from vesting in a benefit *or* from accruing additional increments of a benefit in which he had already vested *is* a "participant" with standing to sue for "appropriate equitable relief" to "redress" that violation—whether the relief involves an injunction, a decree of reinstatement, an award of back pay, or their equivalents.

Again, the reasoning of the Tenth Circuit in this case is at odds with the construction of ERISA by other cir-

cuits and their application of *Firestone*, and it is inconsistent on issues that are fundamental to the application of ERISA by the lower courts.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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June 8, 1993

APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals for the Tenth Circuit, January 20, 1993

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 92-1298

FREDERIC J. RAYMOND, J. A. MORRISON, ROBERT G. JACOBSEN, DONALD F. HILL, GEORGE H. LIVERIS, ROBERT A. IRWIN, A. D. BOND, VIRGINIA HOWARD, IRA S. REAVIS, and BILLY RHEA SARGENT, for themselves and on behalf of others similarly situated, and others as opt in or consent plaintiffs pursuant to applicable federal law,

Plaintiffs-Appellees,

v.

MOBIL OIL CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 88-Z-2112)

[Filed Jan. 20, 1993]

Rodney R. Patula (Elizabeth C. Moran, Gary J. Benson, and Ricardo M. Barrera with him on the briefs), Pryor, Carney & Johnson, Englewood, Colorado, for Plaintiffs-Appellees.

Michael E. Tigar, Austin, Texas (Loren Kieve and John G. Koeltl, Debevoise & Plimpton, New York, New York; Harold A. Haddon and Saskia A. Jordan, Haddon, Morgan & Foreman, P.C., Denver, Colorado, with him on the briefs), for Defendant-Appellant.

Before LOGAN, ANDERSON, and BALDOCK, Circuit Judge.

ANDERSON, Circuit Judge.

In this class action involving the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461, defendant/appellant Mobil Oil Corporation appeals under 28 U.S.C. § 1292(b) from an interlocutory order of the district court denying Mobil's motion for summary judgment on certain claims of plaintiffs, former employees of Mobil.[1] Plaintiffs' action arose out of the same pension plan amendment involved in a previous decision of this court, *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir.), *cert. denied*, 111 S. Ct. 252 (1990), as well as a recent decision of the Fifth Circuit, *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209 (5th Cir.), *cert. denied*, 113 S. Ct. 68 (1992). Because we conclude that plaintiffs are not "participants" in an ERISA plan, and therefore lack standing to sue under ERISA, we reverse the district court's denial of Mobil's motion for summary judgment and remand for entry of summary judgment in favor of Mobil.

BACKGROUND

The essential undisputed facts relevant to this appeal are set forth in the *Mitchell* and *Christopher* opinions. We quote at some length from each:

> Until 1977, Mobil provided retirement benefits only in the form of an annuity. In 1977, Mobil added a "lump-sum option" to its retiremen plan,

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[1] 28 U.S.C. § 1292(b) permits interlocutory appeals from orders involving "a controlling question of law as to which there is substantial ground for difference of opinion. . . ." By order dated September 30, 1992, a panel of this court granted Mobil's petition to bring this interlocutory appeal, and ordered the appeal expedited.

the terms of which, for the purposes of this case, appear in the Retirement Plan of Mobil Oil Corporation as of January 1, 1984 (the Plan). Under the Plan, an employee could elect to receive a lump-sum payment which had the same equivalent actuarial value, discounted at 5%, as the annuity. In the case of early retirement, the Plan reduced the lump-sum payment by 5% for each year of retirement prior to the age of sixty. To qualify for the lump-sum option, an employee had to elect this option prior to retirement; had to be over fifty-five; and, at the date of his retirement, had to have a net worth of at least $250,000 or an accumulated lump sum in excess of $250,000.

In February 1984, Mobil amended the lump-sum option. It raised the discount rate prospectively from 5% to 9.5% and increased the eligibility threshold from $250,000 to $450,000. It also linked the new threshold to the Consumer Price Index (CPI), projecting a rise in the threshold to correlate with a rise in the CPI. These changes, however, would not take effect until at least six months after Mobil announced them, pending approval by the IRS. The delayed effective date gave employees who were eligible for the lump-sum payment under the old criteria, but who might not meet the new threshold, the opportunity to decide whether to retire and take the lump sum or to continue working and accumulating more pension benefits with the possibility that they might not accumulate sufficient additional benefits to meet the new threshold requirement at the date of their retirement.

Mitchell, 896 F.2d at 466.

On July 16, 1984, Mobil sought a determination from the IRS that the plan as amended continued to meet the Internal Revenue Code's requirements for

favorable tax treatment, including the requirement that pension plans not "discriminate in favor of highly compensated employees." 26 U.S.C. § 401 (a)(4). In meetings in late September 1984, the IRS reviewing agent expressed concern that the amended plan could result in benefits favoring highly compensated employees, and indicated that he might need to seek technical advice from Washington. In response, Mobil adopted another plan amendment allowing Mobil, in its sole discretion, to waive the eligibility threshold in individual cases for valid cause shown. After insertion of this provision, the IRS issued to Mobil a favorable determination letter on November 23, 1984, noting that continued qualification of the plan would depend upon its effect in operation.

Mobil announced the IRS approval to its employees on December 21, 1984, but did not notify its employees of the waiver provision until well after expiration of the six-month window—October 1985.

Christopher, 950 F.2d at 1213.[2]

Porter Mitchell, the plaintiff in *Mitchell*, was a fifty-six year old Mobil employee who retired during the six-month window period, and took his retirement benefits under the lump-sum $250,000 option, for which he qualified.[3] He brought suit, claiming that, by amending its

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[2] The existence of the waiver provision was not discovered by Mitchell in his case until trial was underway. Our decision in *Mitchell* makes no mention of the waiver provision. The plaintiffs in *Christopher* argued that the concealment of the waiver option was fraudulent, and the plaintiffs in this case have, following *Christopher*, made the same fraud argument concerning the waiver option.

[3] As we noted in our decision, the availability of the lump-sum option "was important to Mr. Mitchell because at the time he was making [his choice], the market interest rate was over 9%. As a result, his lump sum, discounted at 5%, was worth approximately 140% more than his annuity." *Mitchell*, 896 F.2d at 466.

retirement plan, Mobil had willfully violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, by constructively discharging him because of his age, had "breached its fiduciary duties under ERISA and had violated ERISA's anti-cutback provision, 29 U.S.C. § 1054(g), by retroactively limiting his right to the lump-sum benefit, an accrued benefit." *Mitchell*, 896 F.2d at 466. He also claimed that Mobil violated § 510 of ERISA, 29 U.S.C. § 1140, which prohibits discrimination against or discharge of a participant in an ERISA-covered benefit plan "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan."

After receiving a favorable jury verdict awarding him substantial damages, this court reversed the award on appeal. We held that Mitchell had established that he had been constructively discharged because of his age, but that he had failed to prove that Mobil's proffered justification for its plan amendment was a mere pretext for discrimination.[4] Accordingly, his ADEA claim failed.

We held that Mitchell lacked standing under ERISA to challenge the plan amendment, and therefore reversed the award. We observed that the definition of "participant" under ERISA "excludes . . . former employees who have received a lump-sum payment of all their vested

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[4] We observed that "[t]he relevant question [in a constructive discharge case] is whether Mobil's amendment of the Plan forced Mr. Mitchell, and similarly situated employees, to choose between two options both of which would leave him worse off than the status quo." *Mitchell*, 896 F.2d at 467. We held that it did, because Mitchell was forced to choose between (1) retiring during the six-month window period, as he in fact did, and receiving the lump-sum option under the old ($250,000) eligibility requirement, and (2) continuing to work, but having to requalify for the lump-sum option under the new ($450,000/linked to the CPI) criteria, and being uncertain if he ever would in fact so qualify. Either option was less desirable than the status quo—continuing to work, knowing that he was qualified for a lump-sum retirement when he decided to retire.

benefits because 'these erstwhile participants have already received the full extent of their benefits and are no longer eligible to receive future payments.' " *Mitchell*, 896 F.2d at 474 (quoting *Joseph v. New Orleans Elec. Pension & Retirement Plan*, 754 F.2d 628, 630 (5th Cir.), *cert. denied*, 474 U.S. 1006 (1985)). And we held Mitchell lacked standing as a former employee with a "reasonable expectation of returning to covered employment," *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989), because he had never sought reinstatement.

The *Christopher* plaintiffs also elected to retire during the six-month window period, opting for the lump-sum benefit under the old $250,000 criteria. They similarly filed suit, claiming that Mobil's conduct surrounding the plan amendment constituted age discrimination in violation of the ADEA, as well as "common-law fraud, civil conspiracy, unlawful interference with contract rights, breach of the employment contract, negligence, and gross negligence." *Christopher*, 950 F.2d at 1213. The plaintiffs' complaint also alleged "in brief and conclusory fashion" that Mobil's conduct violated ERISA. *Id.*[5]

The district court granted Mobil's motion for summary judgment on the ADEA claims, holding that they were time-barred and granted Mobil's motion for judgment on the pleadings on the state law claims, holding that they were preempted by ERISA. It granted Mobil's Fed. R. Civ. P. 12(b)(1) and (6) motion to dismiss the contingent ERISA claim on the ground that plaintiffs were not "participants" under ERISA. On appeal, the Fifth Circuit affirmed the grant of summary judgment on the ADEA claims because they were time-barred, affirmed the dismissal of the state law claims as preempted by ERISA, but reversed the dismissal of plaintiffs' ERISA claims and remanded the matter to permit plaintiffs to plead

[5] The brevity of plaintiffs' ERISA allegations was apparently the result of their desire to preserve the ERISA claims in the event their state law claims were held preempted by ERISA.

their ERISA claims with greater specificity. The court specifically noted that it had "not determined that appellants [plaintiffs] will be able to establish a violation of section 510, only that they should be allowed to attempt to do so." *Christopher*, 950 F.2d at 1223.

Plaintiffs in this case are a class of former employees who retired on or before January 1, 1985, who were not told of the waiver option, and who assert that they would not have lost their jobs had they known of their right to apply for a waiver. They also allege that they were unaware of the fact that the $250,000 threshold could be "grandfathered" for each of them, by virtue of the enactment of the Retirement Equity Act ("REA"), effective July 31, 1984.[6] Specifically, they argue that:

> Mobil interfered with their right to the lump sum benefit under the $250,000 test by fraudulently leading plaintiffs to believe that that right was conditioned on an additional requirement, namely that plaintiffs retire early, when in fact that additional condition did not really exist. Plaintiffs were also discharged for the exercise of their right to the lump sum benefit under the $250,000 test and the right to

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[6] Section 301 of the REA prohibits the retroactive elimination of "an optional form of benefit" by means of a plan amendment. 29 U.S.C. § 1054(g). However, the REA specifically states that section 301's prohibition applies only to plan amendments made after July 30, 1984. 29 U.S.C. § 1001, Historical Note (Pub. L. 998-397, Title III, §§ 302, 303, Aug. 23, 1984, 98 Stat. 1451 § 302 (d)(1)). Mobil formally adopted the plan amendment on June 13, 1984, prior to the effective date of the REA. However, because it did not receive IRS approval at that time for the entire amendment, it did not in fact adopt the plan with the waiver provision until September, 1984. Thus, plaintiffs argue that the entire plan amendment *was* subject to the REA, so that the right to retire under the $250,000 lump sum was "grandfathered". While they do not suggest that Mobil can be charged with concealing the existence and effect of the REA, they do claim that Mobil concealed the facts (i.e. the true date of the plan amendment) bearing upon their rights under the REA.

> be free from the cutback of that benefit. And Mobil fraudulently caused plaintiffs' discharges so that they could not attain the right under the Plan to apply for a waiver of the $450,000 requirement, and thereby keep both their jobs and the lump sum benefit.

Brief of Appellees at 24-25.

They filed suit, alleging that Mobil's conduct constituted a willful violation of the ADEA, as well as a violation of section 510 of ERISA.[7] Plaintiffs amended their complaint twice, ultimately deleting all of their ERISA claims except those based on a fraudulent discharge in violation of section 510. As a result of the alleged ERISA violations, plaintiffs seek

> all equitable and other relief as may be necessary to redress plaintiffs' rights asserted under those claims and to redress the violations of law alleged in those claims, including an order compelling reinstatement or equitable reinstatement of each plaintiffs' employment at a status and salary commensurate with his tenure as though his employment with Mobil were uninterrupted and with all previously elected retirement benefits, as well as accounts benefits, both past and future, as well as all other compensatory, consequential, and incidental measures of restitution, together with interest, attorneys' fees, costs, expert witness fees, punitive and exemplary damages.

Third Amended Complaint at 22, Appellant's Appendix Vol. I at A000022.

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[7] ERISA § 510, 29 U.S.C. § 1140, provides in pertinent part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant . . . for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . .

DISCUSSION

Under ERISA § 502, 29 U.S.C. § 1132, "participants" have standing to bring civil actions to enforce their rights under the terms of an ERISA-covered benefit plan or to enforce ERISA's provisions.[8] The term "participant" is statutorily defined as "any employee or former employee of an employer, . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan . . . ." ERISA § 3(7), 29 U.S.C. § 1002(7). In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989) the Supreme Court further defined the term "participant," holding that it "is naturally read to mean either 'employees in, or reasonably expected to be in, currently covered employment,' or former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits." (quoting *Saladino v. I.L.G.W.U. Nat'l Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985), and *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.) (per curiam), *cert. denied*, 479 U.S. 916 (1986)). The Court has defined the statutory term "may become eligible" as requiring proof that the claimant has "a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Firestone*, 489 U.S. at 117-18; *see also Uselton v. Commercial Lovelace Motor Freight, Inc.*,

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[8] Section 502 provides in pertinent part:

> (a) Persons empowered to bring a civil action
>
> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

ERISA § 502, 29 U.S.C. § 1132.

940 F.2d 564, 581 n.16 (10th Cir.), *cert. denied,* 112 S. Ct. 589 (1991). Thus, to have standing to bring an ERISA action, plaintiffs must either be employees in or reasonably expected to be in currently covered employment, or former employees with a reasonable expectation of returning to covered employment or a colorable claim to vested benefits. Employees or former employees seeking to show they "may become eligible" for a benefit must prove that they have a colorable claim that they will prevail in a suit for benefits, or that eligibility requirements will be fulfilled in the future.

Plaintiffs argue that this case is like *Christopher* and, more importantly, is distinguishable from *Mitchell.* They therefore claim they should be afforded standing as participants, as the *Christopher* plaintiffs provisionally were, and not be bound by our finding of no standing in *Mitchell.*

The crucial difference they assert exists between this case and *Mitchell* is that the entire case in *Mitchell* proceeded on the theory that Porter Mitchell was presented with a choice between retiring under the $250,000 lump sum option and continuing to work with the uncertainty of ever qualifying for the $450,000 lump sum. Thus, they characterize our *Mitchell* opinion as holding that "an employee faced with a difficult choice between preserving a valuable retirement benefit but giving up his job versus foregoing the benefit and keeping his job generally cannot choose the former, leave his job with all earned wages and benefits paid, and then later sue under ERISA for wages and benefits not earned." Brief of Appellees at 2. They assert that the choice Mr. Mitchell made was a "conscious one" even if "coercive" and amounting to a "constructive discharge." Because Mr. Mitchell's choice was conscious, plaintiffs argue, he could only establish ERISA standing by meeting one of the tests for "former employees" under *Firestone*—either a colorable claim to vested benefits or a reasonable expectation of returning to covered employment.

By contrast, they assert that plaintiffs' choices here were *not* conscious, because they were fraudulently procured and were therefore "no different from outright firings under ERISA § 510." *Id.* at 3. Relying on *Christopher*, they argue that Mobil's deceptive and fraudulent conduct, in violation of ERISA, vitiated the voluntariness of their decisions to retire. They therefore assert that, unlike Porter Mitchell, they need not establish standing as "former employees." While plaintiffs are obviously *in fact* former employees, they argue they are to be viewed legally as current employees, with clear participant status because they were current employees at the time of the ERISA violation which effectively involuntarily discharged them.[9] Even if they have to establish standing as former employees, plaintiffs argue they have demonstrated the existence of a genuine factual issue as to whether they have a reasonable expectation of returning to covered employment, such that Mobil's motion for summary judgment was properly denied.

Mobil responds that this case "is *Mitchell* redux." Brief of Appellant Mobil Oil Corporation at 17. It contends both that Mr. Mitchell clearly argued and the *Mitchell* opinion clearly held that an employee who retires, even if fraudulently induced to do so, and takes all the vested benefits to which he is entitled and does not ask his employer for reinstatement and has no reasonable expectation, based on custom or practice, that he will be reinstated, lacks standing to bring an ERISA action. He is clearly a former employee, who has no colorable claim to vested benefits (he has received them all already and cannot show that he will fulfill eligibility requirements in the future) and has no reasonable expectation of return-

[9] They alternatively argue that their standing as participants must be determined as of the time of the ERISA violation, and not at the time of their lawsuit. Under that theory too they would have participant status because they were clearly participants at the time of the alleged ERISA violation, and they would not have to meet the former employee tests for standing.

ing to covered employment (he has not sought reinstatement from his employer, and has no factual basis for believing that he will be reinstated).[10] He is merely seeking damages, not ERISA-protected benefits.

Thus, Mobil asserts that *Mitchell* correctly established a bright-line test that ERISA protects only benefits, and an employee who leaves his employment, under *any* circumstance, and receives all his benefits, cannot sue under ERISA. Moreover, *Mitchell* established that a request for judicial reinstatement is *per se* insufficient to establish a reasonable expectation of returning to covered employment. "Thus, ERISA does not provide a cause of action for former employees who have fulfilled all their eligibility requirements, received the full amount of their vested benefits, and seek only (a) reinstatement to accrue further benefits or (b) damages based on years they never worked." Brief of Appellant Mobil Oil Corporation at 28-29.

We review the denial of a motion for summary judgment de novo, applying the same standard as did the district court. *Miller v. Coastal Corp.*, No. 92-3030, 1992 U.S. App. LEXIS 28306 (10th Cir., October 30, 1992). Summary judgment will only be granted if "viewing the facts in the light most favorable to the opposing party, there is no genuine issue of material fact in dispute and the moving party should prevail as a matter of law." *Millensifer v. Retirement Plan for Salaried Employees of Cotter Corp.*, 968 F.2d 1005, 1007 (10th Cir. 1992) (quoting *Woolsey v. Marion Lab., Inc.*, 934 F.2d 1452, 1456 (10th Cir. 1991)); *Boren v. Southwestern Bell Tel. Co., Inc.*, 933 F.2d 891, 892 (10th Cir. 1991).

We begin by rejecting plaintiffs' rather novel argument that they really are, legally, current employees. As

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[10] Mobil argues that plaintiffs have failed to show *either* that they have a reasonable expectation of returning to covered employment or a colorable claim to vested benefits by showing that eligibility requirements will be fulfilled in the future.

indicated, ERISA provides a remedy for "participants." "Participants" include " 'employees in, or reasonably expected to be in, currently covered employment,' " *Firestone,* 489 U.S. at 117 (quoting *Saladino,* 754 F.2d at 476), or certain "former employees." Attributing " 'conventional meanings to the statutory language,' " *id.,* as we must, it defies common sense to conclude that employees who retired some seven years ago are anything other than "former employees." Thus, plaintiffs are, in fact and in law, "former employees." *See Katzoff v. Eastern Wire Prod. Co.,* No. 91-0371 U.S. App. LEXIS 18992 at *6 (D.R.I., Dec. 8, 1992) (rejecting argument that plaintiff was a current employee and therefore an ERISA participant even though he was "not currently working"); *Andre v. Salem Technical Serv.,* 797 F. Supp. 1416, 1421 (N.D. Ill. 1992) ("Because [plaintiff] no longer works for [employer], he does not fall within the statutory provision for suits by current 'employees.' ").

In reaching this conclusion, we similarly reject plaintiffs' related argument that their standing as participants should be judged as of the time of the ERISA violation and not as of the time of their lawsuit. Such an interpretation runs counter to the natural meaning of ERISA itself. Section 502 provides that "[a] civil action *may be brought . . . by a participant . . .* to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." ERISA § 502, 29 U.S.C. § 1132 (emphasis added). The statute by its terms does *not* permit a civil action by someone who *was* a participant at the time of the alleged ERISA violation. *Cf. Teagardener v. Republic-Franklin Inc. Pension Plan,* 909 F.2d 947, 951 n.2 (6th Cir. 1990) ("The Plan provides benefits for a 'Former Participant,' a term that is not defined or mentioned in ERISA."), *cert. denied,* 111 S. Ct. 628 (1991). Rather, it is written in the present tense, indicating that current participant status is the revelant test. *See Winchester v. Pension Comm. of*

Michael Reese Health Plan, Inc., 942 F.2d 1190, 1194 (7th Cir. 1991) ("[Plaintiff] was not a plan participant at the time the action was filed and thus has no standing."); *Yancy v. American Petrofina, Inc.*, 768 F.2d 707, 708 (5th Cir. 1985) ("[Q]uestions of standing must be resolved on the facts existing when the challenge is raised."); *McKinnon v. Cairns*, 698 F. Supp. 852, 858 (W.D. Okla. 1988). Furthermore, there would be little need for the widely-invoked category of "former employees" if participant status was based upon status at the time of the alleged ERISA violation.[11]

Having concluded that plaintiffs must meet the requirements for former employees in order to satisfy ERISA's "participant" requirement, we conclude that, despite plaintiffs' artful attempts to fit within *Christopher, Mitchell* compels the conclusion that plaintiffs lack standing.

As indicated, only former employees who are or "may become eligible to receive a benefit of any type from an employee benefit plan" satisfy the participant requirement of ERISA. That definition includes "former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits." *Firestone*, 489 U.S. at 117 (quoting *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.) (per curiam), *cert. denied*, 479 U.S. 916 (1986)). A former employee may further prove that he or she

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[11] We disagree with plaintiffs' assertion that *Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992), "held that an employee who has lost his status as a current employee and thus as an ERISA 'participant' as a result of his employer's deceit has standing to sue under ERISA because he had such standing at the time of the ERISA violation." Brief of Appellees at 5. In *Drennan*, the Sixth Circuit held that employees who were eligible for a certain benefit payout were participants for ERISA purposes, even though they had already received their benefits under another, less favorable, benefits plan. By contrast, plaintiffs here in fact received all benefits for which they were eligible. They cannot claim participant status based on eligibility for benefits not received.

"may become eligible" to receive a benefit by showing he or she has "a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Id.*

We held in *Mitchell* that that definition simply "excludes . . . former employees who have received a lump-sum payment of all their vested benefits because 'these ertswhile participants have already received the full extent of their benefits and are no longer eligible to receive future payments.'" *Mitchell,* 896 F.2d at 474 (quoting *Joseph,* 754 F.2d at 630); *see also Sanson v. General Motors Corp.,* 966 F.2d 618, 621 (11th Cir. 1991) (retiree claiming he was fundamentally induced to retire early is not an ERISA participant); *Boren,* 933 F.2d at 893-94; *Teagardener,* 909 F.2d at 952 ("Explicit in the Supreme Court's definition of 'participant' in *Bruch* is a requirement that the plaintiffs prove either that their right to assets has 'vested' or will 'vest.'"); *Nishimoto v. Federman-Bachrach & Assocs.,* 903 F.2d 709, 714 (9th Cir. 1990) ("former employees whose vested benefits under a plan have already been distributed in a lump sum at the time they file suit are not 'participants' within the meaning of section 1002(7)"). They therefore seek "a damage award, not vested benefits improperly withheld." *Mitchell,* 896 F.2d at 474; *Boren,* 933 F.2d at 893-94; *Saporito v. Combustion Eng'g, Inc.,* 843 F.2d 666, 671 (3rd Cir. 1988) ("As a general rule, employees who take early retirement and elect to receive lump sum retirement benefits do not have standing to seek the increased payment later made to retirees or to challenge changes in the retirement plan."), *vacated,* 489 U.S. 1049 (1989); *Kuntz,* 785 F.2d at 1411 ("plaintiffs are not participants because, as former employees whose vested benefits under the plan have already been distributed in a lump sum, [they] were not 'eligible to receive a benefit' and were not likely to become eligible to receive a benefit, at the time they filed the suit."); *Yancy v. American Petrofina, Inc.,* 768 F.2d 707 (5th

Cir. 1985) (per curiam); *cf. Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan,* 883 F.2d 345, 350 (5th Cir. 1989) (plaintiffs are ERISA participants because they claimed "that the amount received was not the full amount of vested benefits due under the terms of the profit sharing plan . . . ."). The crucial point is the receipt of the "full extent" of their vested benefits. That is equally true of plaintiffs in this case. They too seek a damage award based upon their allegedly fraudulent discharge from their jobs; they do not seek "vested benefits improperly withheld."

Plaintiffs invoke the *Christopher* court's analysis in an attempt to avoid the breadth of that holding in *Mitchell.* Thus, they argue that the fact that Mobil fraudulently induced them to retire by hiding from them the existence of the waiver provision and certain facts which they needed to be able to properly evaluate the impact of the REA on their pension rights, somehow renders our *Mitchell* holding inapplicable to them. We disagree. The existence of fraud is irrelevant to the linchpin of our *Mitchell* holding—the receipt of all benefits to which the employee is entitled under the plan.

Furthermore, the *Christopher* court itself acknowledged, in its discussion of plaintiffs' ADEA claims, that the alleged fraud made no legal or conceptual difference concerning the voluntariness of plaintiffs' decision:

> [A]ppellants allege a constructive discharge arising from the choice to which they were put by the plan amendment. To further argue that the actual election made was involuntary because it was based on incomplete information would be superfluous; involuntariness is implicit in appellants' argument that they were coerced into early retirement by the threatened removal of the lump sum option.

Christopher, 950 F.2d at 1215. Similarly, plaintiffs here cannot say that the constructive discharge in *Mitchell* was actually a conscious choice whereas the equally com-

pelled discharge here was completely involuntary simply because plaintiffs here acted on incomplete information.

Moreover, the *Christopher* court's "but for" standing analysis—"but for the employer's conduct alleged to be in violation of ERISA, the employee *would* be a current employee with a reasonable expectation of receiving benefits", *Christopher*, 950 F.2d at 1221—amounts to the kind of analysis rejected by the Supreme Court in *Firestone*: "[t]o say that a 'participant' is any person who claims to be one begs the question of who is a 'participant' and renders the definition set forth in § 1002(7) superfluous." 489 U.S. at 117. To say that but for Mobil's conduct, plaintiffs would have standing is to admit that they lack standing and to allow those who merely *claim* to be participants to be deemed as such. *See Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986) ("The effect of reading a 'but for' test is to impose participant status on every single employee who *but for* some future contingency may become eligible. Neither caselaw nor other provisions of ERISA supports such a reading of 'participant.' "). Plaintiffs therefore cannot, under *Firestone*, *Mitchell*, and *Boren*, show that they are former employees with a colorable claim to vested benefits.[12]

Plaintiffs also assert that they satisfy the "participant" requirement as former employees with "a reasonable expectation of returning to covered employment." More specifically, they argue that there is a genuine factual dispute as to that issue, such that summary judgment for Mobil on their ERISA claims would be improper.

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[12] We also note, as have several other courts, that Department of Labor regulations interpreting ERISA specifically exclude from the definition of participant "an individual to whom an insurer has made an irrevocable commitment to pay all the benefits to which the individual is entitled under the plan." 29 C.F.R. § 2610.2. *See, e.g., Teagardener*, 909 F.2d at 952; *Kuntz*, 785 F.2d at 1412; *Joseph*, 754 F.2d at 630; *Saladino v. I.L.G.W.U. Nat'l Retirement Fund*, 754 F.2d 473, 476-77 (2d Cir. 1985); *see also* 29 C.F.R. § 2510.3-3(d)(2)(ii)(B).

In *Mitchell,* we agreed with Mobil that Mr. Mitchell "has never had a reasonable expectation of returning to covered employment." In so doing, we observed that Mr. Mitchell "did not claim that Mobil had improperly withheld vested benefits. He also did not make such a claim in his complaint, *nor did he seek reinstatement.*" *Mitchell,* 896 F.2d at 474 (emphasis added).

Mobil argues we established a clear rule that a request for judicial reinstatement is *per se* insufficient to establish a "resonable expectation of returning to covered employment," because Mitchell made it clear to this court in his briefs and his petition for rehearing that he had sought judicial reinstatement. Thus, Mobil argues that our rejection of his argument must be viewed in that context and must be read as implying that a request for judicial reinstatement *alone* is insufficient.

We are reluctant to read anything more into a judicial opinion, even one of our own, than what the plain words of the opinion state. Viewing the actual language of our *Mitchell* opinion alone, without any background information to which we may be privy but which others lack, we must conclude that the opinion does not establish any *per se* rule concerning the effect of a request for judicial reinstatement. The opinion simply observes that Mr. Mitchell did not "seek reinstatement," and that was one reason why he did not have a reasonable expectation of returning to covered employment. *Mitchell* is unclear as to what *kind* of request for reinstatement was insufficient to establish a reasonable expectation of returning to covered employment.

We agree with Mobil, however, that plaintiffs here cannot satisfy ERISA's participant requirement by claiming to be former employees with a reasonable expectation of returning to covered employment. Few cases have examined carefully what constitutes such a reasonable expectation. We agree with the analysis in *Shawley v. Bethlehem Steel Corp.,* 784 F. Supp. 1200, 1205 (W.D. Pa. 1992):

> Plaintiffs had no statutory right to be rehired, nor any contractual right to be rehired . . . . It would be paradoxical to hold that the penison plan provisions gave them more. For a reasonable expectation of returning to employment to exist, there must be a claim of right on the part of the former employee to return to work.

See also Winchester v. Pension Comm. of Michael Reese Health Plan, Inc., 942 F.2d 1190, 1193 (7th Cir. 1991) (refusing to hold that "by filing a discrimination suit, [after being dismissed for cause], plaintiff may harbor a 'reasonable expectation of returning to covered employment.' "); *Zydel v. Dresser Indus., Inc.*, 764 F. Supp. 277, 280-81 (W.D.N.Y. 1991) (reasonable expectation of returning to covered employment evaluated with reference to four specific pieces of evidence); *Rhee v. Witco Corp.*, 762 F. Supp. 211, 213 (N.D. Ill. 1991) (ERISA plaintiff had no reasonable expectation of returning to covered employment because he "does not seek to return to work . . .; he wants only to obtain the benefits he would have accrued had he continued to work."); *Deller v. Portland Gen. Elec. Co.*, 727 F. Supp. 1369, 1370 (D. Ore. 1989) (former employees terminated pursuant to a reduction in force "are clearly not employees . . . who have a reasonable expectation of returning to covered employment."). We hold as a matter of law that a reasonable expectation of returning to covered employment cannot encompass the undisputed situation here, where plaintiffs retired, received all their vested benefits, did not ask their employer for reinstatement and can point to nothing suggesting that Mobil will, should or must reinstate them, but instead filed suit seeking reinstatement to commence accruing benefits anew.

Finally, plaintiffs suggest that a definition of "participant" which excludes them will leave them without a remedy, inasmuch as their state law claims were held

preempted by ERISA.[13] Preemption is not at issue in this case, and we do not address it. However, we note that the fact that a state law claim may be preempted does not necessarily mandate that there be an ERISA remedy. *See Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1333 (5th Cir.) ("While we are not unmindful of the fact that our interpretation of the preemption clause leaves a gap in remedies within a statute intended to protect participants in employee benefits plans, the lack of an ERISA remedy does not affect a pre-emption analysis."), *cert. denied*, 61 U.S.L.W. 3435 (1992); *Cromwell v. Equicor HCE Corp.*, 944 F.2d 1272, 1276 (6th Cir. 1991) ("Nor is it relevant to an analysis of the scope of federal preemption that appellants may be left without a remedy."), *cert. denied*, 113 S. Ct. 2 (1992); *Hospice of Metro Denver, Inc. v. Group Health Ins.*, 944 F.2d 752, 755 (10th Cir. 1991) ("We are aware that preemption normally is not dependent upon the availability of ERISA remedies.") (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987); *Lister v. Stark*, 890 F.2d 941, 946 (7th Cir. 1989)).[14]

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[13] Counsel for plaintiffs stated at oral argument that they have appealed the state court decision finding preemption.

[14] Furthermore, ERISA preemption extends to "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." ERISA § 514(a), 29 U.S.C. § 1144(a). The Supreme Court has "repeatedly stated that a law 'relates to' a covered employee benefit plan for purposes of § 514(a) 'if it has a connection with or reference to such a plan.'" *District of Columbia v. Greater Washington Bd. of Trade*, 1992 U.S. Lexis 7847 at *8 (Dec. 14, 1992) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)); *see also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S. Ct. 478, 482-83 (1990); *FMC Corp. v. Holliday*, 498 U.S. 825, 111 S. Ct. 403, 407-08 (1990); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987); *Monarch Cement Co. v. Lone Star Indus., Inc.*, No. 92-3022, 1992 U.S. App. LEXIS 33293 at *8 (10th Cir. Dec. 22, 1992).

While ERISA's preemption clause is "conspicuous for its breadth," *Ingersoll-Rand*, 111 S. Ct. at 482 (quoting *FMC Corp v.*

Furthermore, while pension and other benefits are undeniably an important part of an employee's compensation package, they are nonetheless an adjunct to the pri-

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Holliday, 111 S. Ct. at 407), we recently observed in *Monarch Cement Co.*, that the:

> purpose of ERISA preemption is twofold. First, preemption "protect[s] the interests of employees and their beneficiaries in employee benefit plans." Second, preemption "ensure[s] that plans and plan sponsors are subject to a uniform body of benefit law . . . [by] minimizing the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government."

1992 U.S. App. LEXIS at *14 (quoting *Straub v. Western Union Tel. Co.*, 851 F.2d 1262, 1265 (10th Cir. 1988) (quoting *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986)) *and Ingersoll-Rand*, 111 S. Ct. at 484). " 'What triggers ERISA preemption is not just any indirect effect on administrative procedures but rather an effect on the primary administrative function of benefit plans, such as determining an employee's eligibility for a benefit and the amount of that benefit.' " *Monarch Cement Co.*, 1992 U.S. App. LEXIS at *8 (quoting *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142, 146-47 (2d Cir.), *cert. denied*, 493 U.S. 811 (1989)); *see also National Elevator Indus., Inc. v. Calhoun*, 957 F.2d 1555, 1558-59 (10th Cir.), *cert. denied*, 113 S. Ct. 406 (1992).

ERISA's preemptive reach, although broad, is not unlimited. *Monarch Cement Co.*, 1992 U.S. App. LEXIS at *10; *Hospice of Metro Denver v. Group Health Ins.*, 944 F.2d 752, 755 (10th Cir. 1991). In *Monarch Cement Co.*, we tried to define the parameters of ERISA preemption, noting that the case law in the area is far from uniform:

> Laws that have been ruled preempted are those that provide an alternative cause of action to employees to collect benefits protected by ERISA, refer specifically to ERISA plans and apply solely to them, or interfere with the calculation of benefits owed to an employee. Those that have not been preempted are laws of general application—often traditional exercises of state power or regulatory authority—whose effect on ERISA plans is incidental.

Id. at *10-*11 (quoting *Aetna Life Ins. Co.*, 869 F.2d at 146); *see also National Elevator Indus., Inc.*, 957 F.2d at 1558-59; *Hospice of Metro Denver*, 944 F.2d at 755. Thus, ERISA does *not* preempt "if the state law has only a 'tenuous, remote, or peripheral' con-

mary item which the employee has—his or her job. And, ERISA's goal of protecting those benefits from interference does not transform ERISA's statutory scheme into a federal job protection scheme where those benefits are fully paid out, or create a federal cause of action for wrongful discharge.[15] To do so would, as Mobil argues, transform traditional employment law in the fifty states.[16] We cannot believe Congress intended such a result when it enacted ERISA. *Cf. Patterson v. Shumate*, 112 S. Ct.

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nection with covered plans, as is the case with many laws of general applicability." *Greater Washington Bd. of Trade*, 1992 U.S. LEXIS at *9 n.1 (quoting *Shaw*, 463 U.S. at 100 n.21)). An argument could certainly be made that the fraud claims plaintiffs have made in this case are such "laws of general applicability."

Thus, this is not a case where the state law "specifically refers" to an ERISA plan, as in *Greater Washington Bd. of Trade*, 1992 U.S. LEXIS at *9, nor even where the preempted claim is "premised on" the existence of an ERISA plan, as in *Ingersoll-Rand*, 111 S. Ct. at 483. The state law claim in *Ingersoll-Rand* was a common law claim for wrongful discharge based upon the employer's desire to prevent the employee from vesting in his benefit plan. There is no such claim here. Rather, plaintiffs here simply allege a wrongful discharge, achieved through fraud. The fact that an ERISA plan was merely part of the means by which Mobil allegedly fraudulently procured plaintiffs' dismissal does not necessarily compel the conclusion under *Ingersoll-Rand* that that state law claim is "premised on" the existence of an ERISA-covered plan. *Cf. Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129 (7th Cir. 1992) (state law wrongful discharge claim preempted because claim was that plaintiff was discharged in order to avoid payment of benefits under ERISA plan); *but see Sanson v. General Motors Corp.*, 966 F.2d 618, 621 (11th Cir. 1992) (plaintiffs' state law fraud claim for fraudulently induced retirement is preempted).

[15] Indeed, Congress knows perfectly well how to create a federal cause of action for wrongful discharge when it wants to. *See, e.g.*, the ADEA, 29 U.S.C. §§ 621-634; Title VII, 42 U.S.C. § 2000e.

[16] Under plaintiffs' theory, to the extent that the employer-employee relationship allows termination at-will under state law, employers would, in some instances, no longer be able to exercise that right whenever an ERISA-covered plan is part of an employee's compensation package.

2242, 2250 (1992) ("ERISA's goal . . . [is to] protect[] *pension benefits.*") (emphasis added); *Massachusetts Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 148 (1985) (purpose of ERISA is "to protect contractually defined benefits."); *Hospice of Metro Denver,* 944 F.2d at 755-56; *Gavalik v. Continental Can Co.,* 812 F.2d 834, 851 (3rd Cir.) ("Proof of incidental loss of benefits as a result of a termination will not constitute a violation of § 510."), *cert. denied,* 484 U.S. 979 (1987); *Stanton v. Gulf Oil Corp.,* 792 F.2d 432, 435 (4th Cir. 1986) ("the legislative intent of ERISA was not to assure the sanctity of early retirement expectations, but to safeguard accrued retirement benefits.").[17]

For the foregoing reasons, we REVERSE the district court's denial of Mobil's motion for summary judgment on plaintiffs' ERISA claims and REMAND for entry of summary judgment in favor of Mobil.

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[17] The appellees' "Request For Leave to File Limited Sur-Reply in Opposition to Motion to Strike Appellees' Supplemental Appendix and Portions of Appellees' Brief" is granted. Appellant's "Motion to Strike Appellees' Supplemental Appendix and Portions of Brief Relying on Supplemental Appendix" is granted insofar as it relates to materials which were not before the district court in this case.

APPENDIX B

Opinion of the United States Court of Appeals for the Fifth Circuit, January 24, 1992

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 90-4562

Jan. 24, 1992

GERALD W. CHRISTOPHER, CHARLES L. PRUNTY, and BILLY G. TURNER,
Plaintiffs-Appellants,

—v.—

MOBIL OIL CORPORATION, RETIREMENT PLAN OF MOBIL OIL CORPORATON and REX ADAMS,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Texas

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Before:

HENLEY,* KING, and GARWOOD,
Circuit Judges.

GARWOOD, *Circuit Judge*:

Appellants brought claims under the Age Discrimination in Employment Act (ADEA) and the Employee Retirement Income Security Act (ERISA), as well as

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*** Circuit Judge of the Eighth Circuit, sitting by designation.**

various common-law claims including fraud, civil conspiracy, and breach of the employment contract, against their former employer Mobil Oil Corporation, based on Mobil's 1984 amendment of its employee benefit plan and alleged failure to disclose to appellants all of the options available under the amended plan. The district court granted Mobil's motion for summary judgment on the ADEA claims on the grounds that the claims were time-barred and that as a matter of law appellants were not constructively discharged in violation of ADEA. The district court also granted Mobil's request for judgment on the pleadings on appellants' state law claims on the ground that they were preempted by ERISA, and dismissed the ERISA claims on the ground that because appellants were not participants seeking to recover benefits from a retirement plan, the court lacked jurisdiction over their ERISA claims. We affirm in part and reverse and remand in part.

Facts and Proceedings Below

The following facts are drawn from the parties' submissions of undisputed facts in connection with Mobil's motions for summary judgment, judgment on the pleadings, and dismissal.

Mobil provides retirement benefits for its employees through a defined benefit plan, under which employees receive a pension based on years of service, salary history, and life expectancy. Until 1977, the standard method of receiving these pensions was in the form of an annuity. In that year, however, Mobile [sic] added a lump sum option, enabling certain employees to receive the actuarial equivalent of their annuity, discounted at five percent, in one payment following retirement. To be eligible for the lump sum option, an employee had to have either an accrued lump sum pension benefit, or a net worth independent of the pension, equal to at least $250,000. Also, the employee was required to be at least fifty-five years old.

On July 2, 1984, Mobil announced changes to the lump sum option of the retirement plan, including (1) an increase in the discount rate from 5% to 9.5%, to operate prospectively, *i.e.*, to be applied to all earnings after January 31, 1985; (2) an increase in the eligibility threshold from $250,000 to $450,000; and (3) a linking of the new threshold to the Consumer Price Index. These changes, which were announced as subject to Internal Revenue Service (IRS) approval, would apply to all employees retiring after January 31, 1985; thus, employees otherwise eligible to retire had a six-month window in which they could retire subject to the lower threshold and lower discount rate. The choice was a significant one for employees who met the $250,000 threshold but who were uncertain ever to meet the indexed $450,000 threshold because, with market interest rates well above 5%, the lump sum pensions were worth 40% more than the annuities. Appellants, Gerald Christopher, Charles Prunty, and Billy Turner, were among the approximately 1,100 Mobil employees who elected to take early retirement during the 6-month window. All three submitted their retirement notices between August and October 1984, and retired as of January 1, 1985.

On July 16, 1984, Mobil sought a determination from the IRS that the plan as amended continued to meet the Internal Revenue Code's requirements for favorable tax treatment, including the requirement that pension plans not "discriminate in favor of highly compensated employees." 26 U.S.C. § 401(a)(4). In meetings in late September 1984, the IRS reviewing agent expressed concern that the amended plan could result in benefits favoring highly compensated employees, and indicated that he might need to seek technical advice from Washington. In response, Mobil adopted another plan amendment allowing Mobil, in its sole discretion, to waive the eligibility threshold in individual cases for valid cause shown. After insertion of this provision, the IRS issued to Mobil a

favorable determination letter on November 23, 1984, noting that continued qualification of the plan would depend upon its effect in operation.

Mobil announced the IRS approval to its employees on December 21, 1984, but did not notify its employees of the waiver provision until well after expiration of the six-month window—October 1985. Because of a 1985 IRS revenue ruling and subsequent pronouncements, Mobil eventually entirely deleted the lump sum eligibility threshold in 1986.

Appellants filed age discrimination charges against Mobil with the Equal Employment Opportunity Commission (EEOC) on March 1, 1989. They alleged that Mobil's conduct in amending the plan and concealing the waiver provision was a concerted scheme to reduce its work force. By purporting to increase the lump sum threshold and concealing its awareness that applicable tax law precluded that action, appellants charged, Mobil induced hundreds of older employees into retirement without the need to pay them an early retirement bonus. The EEOC dismissed the charges as untimely filed. Appellants then commenced this suit on July 7, 1989. They alleged that Mobil's conduct constituted age discrimination in violation of ADEA, 29 U.S.C. §§ 621 *et seq.*, as well as common-law fraud, civil conspiracy, unlawful interference with contract rights, breach of the employment contract, negligence, and gross negligence. In the event that appellants' state law claims were held to be preempted by ERISA, the complaint alleged in brief and conclusory fashion that Mobil's conduct violated ERISA, apparently ERISA § 510, 29 U.S.C. § 1140, prohibiting interference with an employee's attainment of a right under ERISA. For all claims, appellants sought the wages and employment benefits they would have received had they continued working until normal retirement age. On the ADEA claims, appellants also requested reinstatement.

Mobil moved for summary judgment on the ADEA and state law claims. The district court granted the motion, finding that the ADEA and state law claims were time-barred, that appellants had not been constructively discharged in violation of the ADEA, and that appellants' claims of discrimination arose from changes in fringe benefits available under a bona fide retirement plan, not from discrimination in nonfringe aspects of employment, and thus were not within the purview of the ADEA according to ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2). Simultaneously, Mobil moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) on the state law claims on the ground that they were preempted by ERISA, and dismissal under Federal Rules of Civil Procedure 12(b)(1) & (6) of the contingent ERISA claim on the ground that appellants were not "participants" seeking to recover benefits under ERISA § 502, 29 U.S.C. § 1132, depriving the court of jurisdiction. The district court granted this motion as well.

Discussion

I. ADEA Claims

We first examine the district court's grant of summary judgment on the ADEA claims on the ground that they were time-barred. In reviewing a grant of summary judgment, all legitimate factual inferences presented by the record are drawn in favor of the party opposing the motion. *Bozé v. Branstetter,* 912 F.2d 801, 804 (5th Cir. 1990) (per curiam). We can uphold the summary judgment only if our review demonstrates that no genuine issue of material fact remains and that the moving party is entitled to judgment as a matter of law. *Id.*

It is not disputed that the applicable statutes of limitations require an employee to file an age discrimination charge with the EEOC within 300 days after the alleged unlawful practice occurred, 29 U.S.C. § 626(d)(2), and to file a lawsuit within 3 years after the alleged unlaw-

ful practice occurred, 29 U.S.C. §§ 255(a), 626(e). Appellants argue, however, that a genuine issue of material fact exists as to when their awareness of the facts constituting the alleged age discrimination was sufficient to commence the running of the limitations period. *See Pruet Production Co. v. Ayles*, 784 F.2d 1275, 1279 (5th Cir. 1986) ("[T]he statute does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with reasonably prudent regard for his rights." (quoting *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 930 (5th Cir. 1975))). Specifically, they argue that Mobil's negotiation of a revised plan in October 1984 only came to light in 1988 when counsel for another former employee, Porter Mitchell (Mitchell), suing Mobil in federal district court in Colorado, discovered the correspondence between Mobil and the IRS. It was only when this fact became publicly known at the trial of *Mitchell v. Mobil Oil Corp.* in December 1988,[1] appellants argue, that they had any reason to know of Mobil's concealment of the waiver option. Appellants' EEOC filing in March 1989 and their commencement of this suit in July 1989

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[1] The alleged fraud was not part of Mitchell's claims against Mobil. He argued, rather, that the plan amendment itself constituted a constructive discharge and was a willful violation of the ADEA. He also argued that Mobil had breached its fiduciary duties under ERISA § 404, 29 U.S.C. § 1104, and had violated ERISA's anti-cutback provision, ERISA 204(g), 29 U.S.C. § 1054(g), by retroactively limiting his right to the lump sum option, an accrued benefit. The jury found in favor of Mitchell on his ADEA claim and awarded him damages for back pay, front pay, and lost benefits. The district court held in favor of Mitchell on the ERISA claims as well, awarding him compensatory and liquidated damages. On appeal, the Tenth Circuit reversed, holding that Mitchell had failed to prove that Mobil's proffered justification for the plan amendment was a mere pretext for discrimination, and that Mitchell was not a participant with standing to assert ERISA claims. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 471-74 (10th Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990).

would both have been timely if the statute of limitations had commenced running in December 1988.

Evaluating the appellants' claim that the statute of limitations did not commence until December 1988 requires an analysis of the nature of their ADEA claim. The ADEA forbids an employer to "discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). A "discharge" within the meaning of this section may be constructive if a reasonable person in the employee's position would have felt compelled to resign under the circumstances. *Bodnar v. Synpol, Inc.*, 843 F.2d 190, 192 (5th Cir), *cert. denied*, 488 U.S. 908, 109 S.Ct. 260, 102 L.Ed.2d 248 (1988). An attractive early retirement offer, however, is not a constructive discharge merely because it creates a strong incentive to retire; an early retirement option can constitute a constructive discharge only if the employee shows that it sufficiently alters the status quo that each choice facing the employee makes him worse off. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 467 (10th Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990); *Bodnar*, 843 F.2d at 193.

The gist of appellants' *prima facie* ADEA claim is as follows. The adoption of the 1984 plan amendment presented appellants with a choice between unfavorable options; they faced the choice of retiring within the six-month window or staying on at Mobil but possibly forgoing eligibility for the lump sum payout. Either could be regarded as less favorable than staying on at Mobil until normal retirement age with the assurance of eligibility for the lump sum payout, which was the "status quo" when the amendment was adopted. The asserted discriminatory character of the amendment to the plan arises from the fact that only employees over the age of fifty-five were put to that choice. Employees under

fifty-five did not presently qualify for retirement, so although the plan amendment may have defeated an expectation for them, they were not confronted with the possibility of losing a benefit for which they were then qualified. *See Mitchell*, 896 F.2d at 496.

This much of the ADEA theory was evident in July 1984 upon the initial announcement of the plan. The unfavorable choice to which it put "window" employees and its particular impact on employees over fifty-five were both apparent on the face of the plan amendment. Indeed, the theory outlined above was precisely Mitchell's claim against Mobil, accepted by the Tenth Circuit. Mitchell filed a complaint with the EEOC on April 25, 1985, with no knowledge of Mobil's alleged concealment of the waiver provision. Moreover, another employee, Frederic J. Raymond (Raymond), filed a similar charge with the Ohio Civil Rights Commission and the EEOC on May 10, 1985. Therefore, unless appellants can show that Mobil's alleged concealment adds a material element to their ADEA claim, the statute of limitations should have commenced running in July 1984.

Appellants have offered no theory under which the alleged nondisclosure is a necessary element. They refer us to the Fourth Circuit case of *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 167 (4th Cir. 1988), for their argument that "where, as here, the employee surrenders his job as a proximate result of fraud and deceit by the employer, the voluntariness of the retirement or resignation is fundamentally vitiated." *Stone* is one of a series of cases where resignations have been held to be involuntary based on an employer's misrepresentations about or nondisclosure of an employee's rights. Others include *Covington v. Department of Health and Human Services*, 750 F.2d 937 (Fed.Cir.1984), and *Scharf v. Department of the Air Force*, 710 F.2d 1572 (Fed.Cir.1983).

We do not believe that these cases avail appellants, however. As appellants' phrasing of their argument reflects, the effect of a showing of fraud in these cases is to render an otherwise voluntary choice involuntary. *Stone* and related cases involve disputes in which public employees were entitled to certain procedural protections if they were to be terminated involuntarily; they were required to show that their retirement was involuntary to invoke the jurisdiction of the Merit Systems Protection Board or to establish a "deprivation" under the due process clause. Here, by contrast, appellants allege a constructive discharge arising from the choice to which they were put by the plan amendment. To further argue that the actual election made was involuntary because it was based on incomplete information would be superfluous; involuntariness is implicit in appellants' argument that they were coerced into early retirement by the threatened removal of the lump sum option. Assuming, *arguendo* only, that appellants' allegations of nondisclosure would serve to estop Mobil from raising in defense the claim that appellants' retirement was voluntary, nevertheless the asserted nondisclosure does not form a material part of appellants' constructive discharge theory that would prevent the statute of limitations from commencing.

Appellants' arguments that this Court should apply equitable tolling or equitable estoppel fail for similar reasons. These doctrines provide for tolling of the statute of limitations when a plaintiff's unawareness of his ability to bring a claim—either unawareness of the facts necessary to support a discrimination charge or unawareness of his legal rights—is due to defendant's misconduct. *See Rhodes v. Guiberson Oil Tools Division*, 927 F.2d 876, 878-79 (5th Cir.), *cert. denied*, —— U.S. ——, 112 S.Ct. 198, 116 L.Ed.2d 158 (1991); *Kale v. Combined Insurance Co.*, 861 F.2d 746, 752 (1st Cir. 1988). Here, the knowledge allegedly concealed from the

employees was that they had a third option—to continue their employment and apply for a waiver from the higher lump sum requirement. Therefore, the facts as known to the employees in 1984 actually gave them a *better* ADEA claim than they would have had with full knowledge. Whatever nondisclosures Mobil is guilty of would not have lulled appellants into postponing assertion of their rights; if anything, it would have made them *more* likely to assert that they were constructively discharged.

Finally, appellants argue that although they knew in 1984 of the plan amendment and retirement window, they were misled into believing that they had no cause of action by Mobil's plausible justifications for its amendment of the plan, *i.e.*, that the threshold was changed to adjust for intervening inflation and that the discount rate was raised to align Mobil's practice with that of its competitors and to more realistically reflect current interest rates. In other words, appellants contend that although the discriminatory *effect* of the amendment was apparent in 1984, it was only upon learning of the concealment of the waiver option that they had reason to believe the plan amendment was actuated by age bias and that the alleged concerted scheme to reduce the work force began to take shape.

We find this argument unpersuasive as well. First, we fail to see how the deception alleged by appellants calls into question Mobil's proffered justifications for the plan amendment. The evidence does not create a genuine dispute as to the factual accuracy of Mobil's proffered justifications. Even if appellants' allegations are true respecting Mobil's having deceived its employees about the validity under applicable tax law of the plan amendment and about the waiver provision, there is no evidence showing that Mobil's announced reasons for the plan amendment were deceptive. This is an issue on which appellants would have had the burden at trial, and they were hence required to meet Mobil's summary judgment

motion with summary judgment evidence that would sustain a jury finding in their favor on the issue. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Blumberg v. HCA Management Co., Inc.*, 848 F.2d 642, 644 (5th Cir.1988), *cert. denied*, 488 U.S. 1007, 109 S.Ct. 789, 102 L.Ed.2d 781 (1989).

In any event, a showing of deception as to motive supports equitable estoppel only if it conceals the very fact of discrimination; equitable estoppel is not warranted where an employee is aware of all of the facts constituting discriminatory treatment but lacks direct knowledge of the employer's subjective discriminatory purpose. Thus, where an employee was told that he was being discharged because industry economic downturn required reduction of the work force, and was told that he would be considered for re-hiring, we applied equitable estoppel to hold that limitations on his ADEA claim did not commence until he learned that he had been replaced by a younger employee. *Rhodes*, 927 F.2d at 880-82; *see also Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 595 (5th Cir.1981) (en banc) (employer's misrepresentation that employee would be reinstated induced foreseeable forebearance in filing ADEA claim); *Meyer v. Riegel Products Corp.*, 720 F.2d 303, 307 (3d Cir.1983) (employer's explanation to employee that he was dismissed as part of a reorganization furnished grounds for equitable tolling in an ADEA suit until discharged employee learned that a younger replacement had been hired), *cert. dismissed*, 465 U.S. 1091, 104 S.Ct. 2144, 79 L.Ed.2d 910 (1984). By contrast, where an employee knew that he was discharged and replaced by a younger employee, his allegation that the company concealed from him the true reason for his discharge and that it was not until subsequent hirings that the "pattern of age discrimination" became evidence was held insufficient to support equitable estoppel. *Pruet Production Co.*, 784 F.2d at

1279-80; *accord Chapman v. Homco, Inc.*, 886 F.2d 756, 758 (5th Cir.1989); *cert. denied*, 494 U.S. 1067, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990); *Blumberg*, 848 F.2d at 645.[2] The showing required for a *prima facie* employment discrimination claim is minimal, *see Pruet Production Co.*, 784 F.2d at 1279, and when "facts that would support a cause of action are or should be apparent," the statute commences even if the employee is not aware of *all* the evidence that he will ultimately rely upon at trial. *Blumberg*, 848 F.2d at 645 (emphasis added). The showing required at the stage of filing charges with the EEOC is even more lenient, because the purpose of the filing is only to initiate an EEOC investigation. *Pruet Production Co.*, 784 F.2d at 1279.

Applying those principles here, we conclude that whatever concealment Mobil may have been guilty of did not deceive appellants as to the facts of the alleged discrimination. Rather, appellants were able to evaluate the propriety of their alleged constructive discharge for ADEA purposes immediately. Just as in individual discharge cases the *prima facie* showing is only that the employee has been discharged and replaced by a younger worker, leaving exploration of an employer's motives for the EEOC investigation or pretrial discovery, here the appellants' *prima facie* case for constructive discharge was that older employees alone were put to the unfavorable choice of early retirement or loss of the lump sum option. This fact, apparent in July 1984, was sufficient to put appellants on notice of possible age discrimination (as it did other Mobil employees) and to require them to assert their rights.

For these reasons, even accepting for purposes of our review of the summary judgment appellants' charges of

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[2] This view is consistent with this Circuit's rule in Title VII cases that the limitations period starts running when the plaintiff knows of the discriminatory *act*, not when the plaintiff perceives a discriminatory motive behind the act. *See Merrill v. Southern Methodist University*, 806 F.2d 600, 605 (5th Cir.1986).

nondisclosure, we do not believe that a genuine issue of material fact exists as to when the statute of limitations on the ADEA claims commenced. Concluding that the district court's grant of summary judgment is supported on that ground, we do not reach the district court's further holding that as a matter of law appellants were not constructively discharged in violation of the ADEA.

II. ERISA Preemption of State Law Claims

We next address the district court's grant of judgment on the pleadings on appellants' state law claims. Appellants charged that Mobil's actions in amending the plan and withholding information about the waiver provision fraudulently induced them to surrender their jobs, were taken pursuant to a plan to reduce Mobil's work force, and breached the duty of good faith and fair dealing owed to appellants by Mobil under their employment contracts. This conduct, appellants alleged, gave rise to claims for fraud, civil conspiracy, breach of the employment contract, unlawful interference with contract rights, negligence, and gross negligence. The district court held these claims were preempted because they "relate to Mobil's Retirement Plan, which is governed by ERISA, and directly overlap with provisions of ERISA." We turn to the first ground relied upon by the district court, namely that appellants' claims "relate to" an ERISA-governed retirement plan.

ERISA's provisions "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." ERISA § 514(a), 29 U.S.C. § 1144(a). The Supreme Court has consistently emphasized the expansiveness of the "relate to" standard and its purpose of establishing the regulation of pension plans as an exclusively federal concern. *See, e.g., Ingersoll-Rand Co. v. McClendon,* —— U.S. ——, 111 S.Ct. 478, 482, 112 L.Ed.2d 474 (1990); *FMC Corp. v. Holliday,* —— U.S. ——, 111 S.Ct. 403, 407, 112 L.Ed.2d 356 (1990);

Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549, 1552-53, 95 L.Ed.2d 39 (1987); *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 103 S.Ct. 2890, 2899-2901, 77 L.Ed.2d 490 (1983). The words "relate to" are to be given their "broad common-sense meaning," *Metropolitan Life Insurance Co. v. Massachusetts,* 471 U.S. 724, 105 S.Ct. 2380, 2389, 85 L.Ed.2d 728 (1985), and a state law will be pre-empted "if it has a connection with or reference to such a plan." *Shaw,* 103 S.Ct. at 2900. This Circuit has held that the fact that a claim sought damages measured by pension benefits sufficed as the requisite "connection" to an employee benefit plan for preemption purposes. *Cefalu v. B.F. Goodrich Co.,* 871 F.2d 1290, 1294 (5th Cir. 1989). *But see Memorial Hospital System v. Northbrook Life Insurance Co.,* 904 F.2d 236, 247 (5th Cir. 1990); *Pizlo v. Bethlehem Steel Corp.,* 884 F.2d 116, 120-21 (4th Cir.1989).

The complaints here focus on Mobil's amendment of an ERISA-governed employee benefit plan and Mobil's disclosure to its employees of the terms of the plan. In addition to calculating their damages by computing lost benefits under the plan, a court adjudicating appellants' claims of a fraudulent scheme to reduce the work force would have to examine, at a minimum, the operation of the plan prior to the amendment, the language of the plan amendments, and Mobil's communication to its employees about the terms of the plan amendments. Given the breadth of the section 514(a) test, we find that these connections are adequate to warrant preemption.

This conclusion is buttressed by decisions of this and other courts addressing claims of fraudulently induced retirement and wrongful termination, which are the crux of appellants' state law claims here. In the closely analogous case of *Lee v. E.I. DuPont de Nemours and Co.,* 894 F.2d 755 (5th Cir.1990), the plaintiffs alleged that they had retired in reliance on their employer's representations that the company was not preparing to adopt

an early retirement incentive plan, and they sued their former employer for fraud and negligent misrepresentation in that respect. We held that the claims were preempted under section 514(a). *Id.* at 758; *see also Cefalu,* 871 F.2d at 1295 (breach-of-contract claim for oral misrepresentation that retirement options offered equivalent benefits was preempted); *Degan v. Ford Motor Co.,* 869 F.2d 889, 895 (5th Cir.1989) (claim for breach of an oral agreement to pay early retirement benefits was preempted). In a case almost identical to the present one, the Third Circuit held that where employees alleged that an employer's notification of proposed plan amendments misrepresented to them that they would lose a retirement benefit if they did not retire in a window period before the amendments became applicable, their claims were preempted. *Berger v. Edgewater Steel Co.,* 911 F.2d 911, 923 (3d Cir.1990), *cert. denied,* —— U.S. ——, 111 S.Ct. 1310, 113 L.Ed.2d 244 (1991).

In addition, the Supreme Court recently spoke decisively to the question whether a tort claim premised on wrongful discharge to prevent vesting of pension benefits could survive independently of ERISA. In *Ingersoll-Rand Co. v. McClendon,* —— U.S. ——, 111 S.Ct. 478, 483, 112 L.Ed.2d 474 (1990), the Court found that the claim "related to" an ERISA-covered plan under section 514 (a). Appellants here seek to distinguish their "wrongful discharge by fraud" claim from the tort claim at issue in *McClendon.* They argue that whereas the existence of a pension plan is a necessary *element* of the cause of action considered in *McClendon* (discharge to prevent vesting of pension bnefits), here the pension plan was merely the *subject* of Mobil's fraud. The fraud claim itself, they argue, is conceptually identical to a fraud claim concerning any other subject matter, and ERISA cannot generally preempt state laws prohibiting employers from fraudulently inducing employees to give up their jobs. Appellants rely on *Mackey v. Lanier Collections Agency and Service,* 486 U.S. 825, 108 S.Ct.

2182, 100 L.Ed.2d 836 (1988), in which the Court noted that lawsuits based on "run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan" are not preempted merely because the suits are brought against an ERISA plan. *Id.* 108 S.Ct. at 2187.

We do not find this argument persuasive. We have previously noted that preempted state law includes any state law cause of action as it relates to an employee benefit plan, even if it arises under a general law which in and of itself has no connection to employee benefit plans. *Cefalu*, 871 F.2d at 1292 n. 5. Although there would undoubtedly be cases of fraudulently induced retirement that were not preempted, the specific conduct here, as in *Lee*, *Cefalu*, and *Degan*, relates directly to the operation of an ERISA plan. Superimposing state law fraud standards on the elaborate ERISA provisions governing the content and timing of notice of plan provisions and amendments, *see* ERISA §§ 102, 104(b)(1), 29 U.S.C. §§ 1022, 1024(b), would undercut the goal of uniform national regulation in the manner that section 514(a) seeks to prevent. *See Memorial Hospital System*, 904 F.2d at 245 (observing that preemption is proper where the state law claims address areas of exclusive federal concern, and where they directly affect the relationship among the traditional ERISA entities). In our view, this makes the conduct at issue here a far cry from the "run-of-the-mill" claims alluded to in *Mackey*.[3]

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[3] Appellants also cite *Greenblatt v. Budd Co.*, 666 F.Supp. 735 (E.D.Pa.1987), which does provide more direct support for their argument than the fact that the *subject* of the alleged fraud is pension benefits is incidental and does not warrant preemption. *See id.* at 742. However, we agree with the Seventh Circuit that *Greenblatt* is not consistent with our Circuit's holding in *Cefalu*. *See Lister v. Stark*, 890 F.2d 941, 945 n. 10 (7th Cir.1989), *cert. denied*, —— U.S. ——, 111 S.Ct. 579, 112 L.Ed.2d 584 (1990). Therefore, we, like the Seventh Circuit, decline to follow *Greenblatt*. *See id.* at 945.

For the same reason, appellants' reliance on *Hartle v. Packard Electric,* 877 F.2d 354 (5th Cir.1989) (per curiam) is misplaced. In *Hartle,* a discharged employee brough suit for wrongful termination and civil conspiracy to unlawfully terminate his employment. Because the general rule in Mississippi was employment at will, he argued that his participation in an employee benefit plan had removed his employment from employment-at-will status and had effectively given him a tenured position. However, because the employer's complained-of-conduct did not pertain to the operation of an ERISA plan, we observed that Hartle's claim did "not in any manner implicate the federal regulation of employee benefit plans" and held that preemption was not proper. *Id.* at 356. Here, the employer's conduct *does* relate to the pension plan, and federal regulation of retirement plans is implicated to a much greater degree.

Finally, appellants argue that even if their state law claims are preempted to the extent that the damages sought are deemed to be "benefits," the preemption would not bar the claims in their entirety, and that the claims for lost wages, exemplary damages, and the like, would survive as state law claims. They rely on several cases finding partial preemption only. One is *Krause v. Dresser Industries, Inc.,* 910 F.2d 674 (10th Cir.1990), in which a terminated employee filed claims under the ADEA and for breach of an implied contract for tenured job security. The district court entered summary judgment for the defendant on the breach-of-contract claim insofar as it sought lost pension, health insurance, or life insurance benefits, on the grounds of ERISA preemption. The Tenth Circuit upheld a verdict for the plaintiff on the claim for lost salary, however, stating, "We are at a loss to see how a breach of contract claim solely for lost salary is at all related to an employee benefit plan," and holding that there was no preemption of that claim. *Id.* at 680 (citing *Hartle, supra*). Likewise, in *Sorosky v. Burroughs Corp.,* 826 F.2d 794 (9th Cir. 1987), the Ninth Circuit held that an employee's claim

of breach of contract and wrongful discharge in part relied on theories independent of the benefit plan and thus was not entirely preempted. *Id.* at 800. Finally, appellants cite *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1245 (11th Cir.1989), for the proposition that the same set of operative facts can give rise to both preempted and unpreempted causes of action.

We conclude that this type of partial preemption is inappropriate in the present case, however. Unlike *Krause*, this case is not one where the main nexus to an employee benefit plan is only the calculation of damages. Once stripped of its link to the pension plan provided by the measure of damages, the *Krause* plaintiff's claim survived as a suit for lost salary based upon breach of an implied contract of continued employment. Here, by contrast, the basis of the claims themselves is the operation of the pension plan; if appellants' claims were stripped of their link to the pension plans, they would cease to exist. The *Sorosky* and *Clark* courts employed a similar analysis which would support complete preemption in the present case. In *Sorosky*, the court held that Sorosky's claim that Burroughs agreed to provide him with monthly retirement benefits and then sought to prevent him from acquiring those benefits was preempted; it was only breach-of-contract or wrongful discharge theories "that have no relationship to the benefit plan" that survived as independent state law claims. *Sorosky*, 826 F.2d at 800. The *Clark* court confronted an employee's claim that his termination, in addition to being effected for the purpose of interfering with his attainment of pension benefits in violation of ERISA § 510, 29 U.S.C. § 1140, was carried out in a malicious manner that inflicted severe emotional distress upon him. The court held that the tort claim, though it "allude[d] to conduct which was proximate (or even concurrent) in *time* to the alleged ERISA violation," was "wholly remote in *content*"; the employee had "not alleged any conduct on the part of Coats & Clark which relates to

the processing of any ERISA covered benefit or claim." *Clark*, 865 F.2d at 1243. However, *Clark* carefully distinguished the employee's claim there from a claim that a refusal to pay pension benefits was itself so outrageous as to amount to intentional infliction of emotional distress, which the court had found to be preempted in *Howard v. Parisian, Inc.*, 807 F.2d 1560 (11th Cir. 1987).

Because the underlying conduct at issue here cannot be divorced from its connection to the employee benefit plan, we uphold the district court's judgment that the state law claims are preempted in their entirety.

III. ERISA Standing

ERISA grants standing to a "participant" to bring a civil action to enforce his rights under the terms of a plan or to enforce the provisions of ERISA. ERISA § 502, 29 U.S.C. § 1132. The district court granted Mobil's motion to dismiss appellants' ERISA claims on the ground that appellants were not "participants" within the meaning of that section and therefore were not empowered to sue. *See Nugent v. Jesuit High School of New Orleans*, 625 F.2d 1285, 1286 & n. 3 (5th Cir. 1980).

ERISA defines the term "participant" to include "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan." ERISA § 3(7), 29 U.S.C. § 1002(7). The Supreme Court recently addressed the meaning of the "former employee" component of that definition. In *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), the Court observed that the definition referred to "former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have a 'a colorable claim' to vested benefits." *Id.* 109 S.Ct. at 958 (quoting *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.)

(per curiam), *cert. denied,* 479 U.S. 916, 107 S.Ct. 318, 93 L.Ed.2d 291 (1986)). The Court also construed the "may become eligible" language of section 3(7) to mean that "a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Id.*

Mobil argues that appellants do not have standing because they have neither a colorable claim for vested benefits nor a reasonable expectation of returning to covered employment. In Mitchell's suit against Mobil, the Tenth Circuit denied ERISA standing to the plaintiffs on the ground here urged by Mobil. *Mitchell v. Mobil Oil Corp.,* 896 F.2d 463, 474 (10th Cir.), *cert. denied,* —— U.S. ——, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990).

The first part of this conclusion finds support in the decisions of this Circuit. We have held that where, as here, retired employees received in a lump sum benefits that were concededly all to which they were entitled under a plan as it existed at their retirement, their claim is for damages, not vested benefits. *Yancy v. American Petrofina, Inc.,* 768 F.2d 707, 708-09 (5th Cir.1985) (per curiam); *Joseph v. New Orleans Electrical Pension & Retirement Plan,* 754 F.2d 628, 630 (5th Cir.), *cert. denied,* 474 U.S. 1006, 106 S.Ct. 526, 88 L.Ed.2d 458 (1985); *accord Kuntz,* 785 F.2d at 1411. In *Yancy,* the employer announced its intention to modify the interest rate factor used to calculate lump sum retirement benefits, but gave employees approximately three months in which to retire under the older, more generous discount rate. We denied standing to an employee who took early retirement during the three months, received his lump sum payment, then sued alleging that the amendment of the plan violated fiduciary duties imposed by ERISA. We held that, lacking a claim for vested benefits, he could not be deemed a plan "participant." *Yancy,* 768 F.2d at 709.

For the second part of its conclusion—that the plaintiff lacked a reasonable expectation of returning to covered employment—the *Mitchell* court relied on the fact that the plaintiff had not sought reinstatement. *Mitchell*, 896 F.2d at 474; *see also Berger v. Edgewater Steel Co.*, 911 F.2d 911, 922 (3d Cir.1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1310, 113 L.Ed.2d 244 (1991); *Kuntz*, 785 F.2d at 1411. In the present case, the only request for reinstatement in appellants' original complaint is in the ADEA claim, which we have held to be barred by the statute of limitations. *See* section I, *supra*. However, this request does indicate that appellants do desire court-ordered reinstatement.

We are not convinced that *Firestone* can be read to reduce the standing question to a straightforward formula applicable in all cases. This seems particularly so in cases involving allegations of discharge. ERISA § 510, 29 U.S.C. § 1140, makes it unlawful for an employer to "discharge, fine, suspend, expel, discipline, or discriminate against a participant" for exercising a right provided by ERISA or "for the purpose of interfering with the attainment" of a right provided by ERISA. The Supreme Court's recent *McClendon* decision held that this provision would foreclose the development of any state law cause of action for wrongful termination to prevent vesting of pension benefits, *Ingersoll-Rand Co. v. McClendon*, —— U.S. ——, 111 S.Ct. 478, 485, 112 L.Ed.2d 474 (1990). The implication of the Court's holding that the discharged employee must look solely to ERISA for his remedy is that he would have standing to do so. Nevertheless, it is not readily apparent that he would have standing under the construction of *Firestone* urged by Mobil; he would be a former employee lacking both a claim for vested benefits and (unless he requested reinstatement) a reasonable expectation of returning to covered employment. It would be unusual if in that situation his ability to assert

a claim at all turned on whether or not his requested relief included reinstatement; it would seem more logical to say that but for the employer's conduct alleged to be in violation of ERISA, the employee *would* be a current employee with a reasonable expectation of receiving benefits, and the employer should not be able through its own malfeasance to defeat the employee's standing. *Cf. Amalgamated Clothing and Textile Workers v. Murdock*, 861 F.2d 1406, 1418 (9th Cir.1988) ("It would be ironic if the very acts of benefit payment and plan termination that allegedly resulted in a fiduciary personally obtaining ill-gotten profits should also serve to deny plan beneficiaries standing . . . to redress the fiduciaries' alleged breach of the duty of loyalty.").[4]

Therefore, recognizing that we are anchored at one end by *Yancy,* we also believe that *Yancy* does not extend so far as to encompass situations such as the one at issue in *McClendon.* The question then becomes where on that axis the present case falls. A few pertinent distinctions between the two cases bear emphasis. Yancy's position as a retired employee who had received lump sum benefits was largely of his own making. He was informed of the plan amendment and of the effects of each option open to him. Our holding in the case amounts to a decision that he could not both accept the offered inducement for early retirement and then later complain of the choice to which he had been put, if he felt that he was entitled to continue to work and then retire at the time of his choice with a lump sum calculated at the old rate, he was obligated to act consistently

[4] We do not mean to imply that an employee's entitlement to certain *remedies* might not turn on whether or not he was willing to return to work. If, for example, he claimed entitlement to the fully vested pension as damages, it might be perfectly reasonable to require that he return to work at least for the additional length of time required for the pension to vest. However, a wrongful discharge might give rise to other damages as well, for which reinstatement would not seem to be a logical prerequisite.

with his desired relief by remaining a covered employee and challenging the plan amendment. The violation he alleged—an amendment of the retirement plan that amounted to a breach of fiduciary duty under ERISA § 409, 29 U.S.C. § 1109—was not one that in and of itself divested aggrieved parties of their status as covered employees able to sue. McClendon, on the other hand, had no such choice. A discharge to prevent vesting of benefits in violation of section 510 by definition must be challenged by someone other than a current employee or someone with a claim to vested benefits. Thus, the standing question and the merits of an employee's claim are unavoidably intertwined to some degree; whether a plaintiff has standing to assert ERISA rights may depend upon whether he can establish a discharge or some other conduct in violation of ERISA, but for which he would have standing. *See Amalgamated Clothing,* 861 F.2d at 1410.

The Third Circuit alluded to this problem in its recent *Berger* decision. There, Edgewater Steel amended its retirement plan to eliminate two benefits: a lump sum payment in place of the first three months of pension benefits, and a supplemental payment given as an early retirement benefit to employees whose retirement was in the mutual interests of the company and the retiree and was approved by the company. Upon announcement of these changes, Berger and the other plaintiffs chose to retire before the amendments became effective. They each received the three-month lump sum provided automatically to all retirees, but none were approved for the supplemental payment. Among the plaintiffs' allegations were a charge that the elimination of the three-month lump sum amounted to the elimination of an accrued benefit in violation of ERISA § 204(g), 29 U.S.C. § 1054(g), and a charge that the amendment constituted an intentional interference with their right to both benefits, in violation of ERISA § 510, 29 U.S.C. § 1140. The

court, citing *Kuntz* and *Yancy*, held that the plaintiffs did not have standing to assert their section 204(g) claim because they had retired and accepted the benefits in a lump sum, and had not asked for reinstatement. *Berger*, 911 F.2d at 921-22. However, the court noted the contingency of this conclusion on the denial of the plaintiffs' section 510 claim. *Id.* at 922. It stated: "Of course, we recognize that if the Employees were constructively discharged as they do claim, they would not necessarily have to return to work in order to have standing to claim a make whole remedy." *Id.*[5]

On the record before us, we cannot say where on the spectrum between *Yancy* and *McClendon* this case falls. Because appellants pleaded their ERISA claims only as contingent on preemption of their state law claims, and because the district court did not rule on the merits of

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[5] A Third Circuit decision in a pre-*Firestone* case provides an even more direct illustration of the contingency of standing on the nature of the ERISA violation alleged. In *Saporito v. Combustion Engineering Inc.*, 843 F.2d 666 (3d Cir.1988), *vacated*, 489 U.S. 1049, 109 S.Ct. 1306, 103 L.Ed.2d 576 (1989), the plaintiffs claimed that they had been induced to retire under one retirement plan while the employer concealed the development of a second plan with more favorable terms. The court held that they did not have standing as participants in the first plan to sue for breach of fiduciary duties because they had retired and received all of the benefit to which they were entitled in a lump sum. *Id.* at 671. However, the court did hold that they had standing as participants in the *second* plan to argue that they had been tricked into retiring in violation of section 510, because they alleged that "but for the selective divulgence of information, they would have been members of [the second plan], and, for the purposes of standing to bring an action under ERISA, should be considered as such." *Id.* at 672; *see also id.* at 672 n. 7 (distinguishing *Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir.1986), in which the plaintiff urged "but for" participant standing, but his claim was rejected because the events precluding standing were under his control). *Saporito* was vacated and remanded by the Supreme Court for further consideration in light of *Firestone*, 489 U.S. 1049, 109 S.Ct. 1306, 103 L.Ed.2d 576 (1989).

the ERISA claims, appellants have not fleshed out their ERISA claims and theories, or even identified with precision which sections of ERISA they claim were violated. However, their allegations do at least suggest an assertion that they were constructively discharged in violation of section 510 and that but for Mobil's nondisclosure they would be covered employees with standing to challenge the plan amendment. They allege deceptive conduct by Mobil that might be found to vitiate the voluntariness of their decision to retire and that might distinguish the present case from both *Yancy* and *Mitchell*. Appellants also sought reinstatement in their ADEA action, and did not affirmatively indicate that reinstatement was not sought under their ERISA claims. For these reasons, we cannot now foreclose the possibility that they could prove facts that would create standing for them, and we believe that the trial court's dismissal on the pleadings of the ERISA claims was premature. Of course, appellants can, and doubtless should, be required to plead their ERISA claims with greater specificity.

We emphasize that we have not determined that appellants will be able to establish a violation of section 510, only that they should be allowed to attempt to do so. We reverse the trial court's dismissal of appellants' ERISA claims and remand for further proceedings consistent with this opinion.

Conclusion

For the reasons stated above, we affirm the district court's grant of summary judgment to Mobil on the ADEA claims and its grant of judgment on the pleadings for Mobil on all of appellants' state law claims. However, we reverse and remand the district court's dismissal of appellants' ERISA claims.

AFFIRMED In Part; REVERSED And REMANDED In Part.

APPENDIX C

Opinion of the United States Court of Appeals for the Tenth Circuit, February 16, 1990 [As Published In 896 F.2d 463]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 89-1019, 89-1031, 89-1085 and 89-1111

PORTER H. MITCHELL,
Plaintiff-Appellee/Cross-Appellant,

v.

MOBIL OIL CORPORATION, a New York corporation; RETIREMENT PLAN OF MOBIL OIL CORPORATION; and TRUSTEES OF THE RETIREMENT PLAN OF MOBIL OIL CORPORATION,
Defendants-Appellants/Cross-Appellees.

ERISA INDUSTRY COMMITTEE and ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS,
Amici Curiae.

Feb. 16, 1990

Rodney Patula (Thomas L. Roberts, Peter H. Ziemke, W. Randolph Barnhart, and Peter W. Pryor, with him on the briefs) of Pryor, Carney & Johnson, Englewood, Colo., for plaintiff-appellee/cross-appellant.

Michael E. Tigar of the University of Texas Law School (Steven J. Merker of Davis, Graham & Stubbs, Denver Colo., and Loren Kieve, Standish F. Medina, Jr., and

Jonathan E. Richman of Debevoise & Plimpton, Washington, D.C., with him on the brief), Austin, Tex., for defendants-appellants/cross-appellees.

Harris Weinstein, John M. Vine, and Dwight C. Smith III of Covington & Burling, Washington, D.C., for amicus curiae Erisa Industry Committee.

Paul J. Ondrasik, Melanie Franco Nussdorf, Suzanne E. Meeker, and Theodore E. Rhodes of Steptoe & Johnson, Washington, D.C., for amicus curiae Ass'n of Private Pension and Welfare Plans.

Before MOORE and ANDERSON, Circuit Judges, and DAUGHERTY, District Judge.*

JOHN P. MOORE, Circuit Judge.

In this case, the Mobil Oil Corporation and one of its former employees, Porter Mitchell, dispute whether changes which Mobil made in its employee benefit plan violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461. At trial, Mr. Mitchell succeeded on his age-discrimination and ERISA claims. Mobil challenges the results below, claiming that Mr. Mitchell did not meet his burden of proof on the age-discrimination claim and that he did not have standing to seek relief under ERISA. We agree with Mobil and reverse.

I. FACTS

Until 1977, Mobil provided retirement benefits only in the form of an annuity. In 1977, Mobil added a "lump-sum option" to its retirement plan, the terms of which, for the purposes of this case, appear in the Retirement Plan of Mobil Oil Corporation as of January 1, 1984

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* The Honorable Frederick A. Daugherty, Senior District Court Judge for the Western District of Oklahoma, sitting by designation.

(the Plan). Under the Plan, an employee could elect to receive a lump-sum payment which had the same equivalent actuarial value, discounted at 5%, as the annuity. In the case of early retirement, the Plan reduced the lump-sum payment by 5% for each year of retirement prior to the age of sixty. To qualify for the lump-sum option, an employee had to elect this option prior to retirement; had to be over fifty-five; and, at the date of his retirement, had to have a net worth of at least $250,000 or an accumulated lump sum in excess of $250,000.

In February 1984, Mobil amended the lump-sum option. It raised the discount rate prospectively from 5% to 9.5% and increased the eligibility threshold from $250,000 to $450,000. It also linked the new threshold to the Consumer Price Index (CPI), projecting a rise in the threshold to correlate with a rise in the CPI. These changes, however, would not take effect until at least six months after Mobil announced them, pending approval by the IRS. The delayed effective date gave employees who were eligible for the lump-sum payment under the old criteria, but who might not meet the new threshold, the opportunity to decide whether to retire and take the lump sum or to continue working and accumulating more pension benefits with the possibility that they might not accumulate sufficient additional benefits to meet the new threshold requirement at the date of their retirement.

Porter Mitchell was one of Mobil's employees who had to make such a choice. He was fifty-six at the time Mobil amended the eligibility criteria for the lump-sum option and had elected to take this option instead of the annuity. He was clearly eligible for the lump-sum option under the $250,000 threshold but was uncertain whether he would be able to meet the $450,000 threshold since it could rise, prior to his retirement, with changes in the CPI. This choice was important to Mr. Mitchell because at the time

he was making it, the market interest rate was over 9%. As a result, his lump sum, discounted at 5%, was worth approximately 140% more than his annuity.

At trial, Mr. Mitchell claimed that by forcing him to make this choice, Mobil had willfully violated the ADEA since it had, in effect, constructively discharged him because of his age. He also claimed that Mobil had breached its fiduciary duties under ERISA and that it had violated ERISA's anti-cutback provision, 29 U.S.C. § 1054(g), by retroactively limiting his right to the lump-sum option, an accrued benefit. The age-discrimination and ERISA claims were tried jointly before a jury, though, the trial court reserved for itself a decision on the ERISA claims.

The jury returned a verdict in favor of Mr. Mitchell, awarding $405,962.76 in backpay damages; $86,000 as compensation for the 20% reduction in Mr. Mitchell's lump-sum benefit; and, $96,740.82 in front-pay damages. Because the jury found that Mobil's violation of the ADEA was willful, the trial court awarded Mr. Mitchell $405,962.76 in liquidated damages as well. The court rejected Mr. Mitchell's claim for pre-judgment interest on his ADEA claim. The trial court also ruled in favor of Mr. Mitchell on his ERISA claims, awarding him $588,703.58 in compensatory damages and $405,962.76 in liquidated damages. Mobil appeals both the jury's verdict and the trial court's judgment. Mr. Mitchell cross-appeals the trial court's measure of damages.

II. THE ADEA CLAIM

A. Mr. Mitchell's Prima Facie Case

The ADEA prohibits an employer from "discharg[ing] any individual or otherwise discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). To establish a

prima facie case of age discrimination by constructive discharge, an employee must prove that his "employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign." *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 344 (10th Cir.1986). An employee who claims that an offer of early retirement constitutes age discrimination by constructive discharge can meet this burden by demonstrating that the offer "sufficiently alters the status quo that each choice facing the employee makes him worse off" and that if he refuses the offer and decides to stay, his employer will treat him less favorably than other employees because of his age. *Bodnar v. Synpol, Inc.*, 843 F.2d 190, 193 (5th Cir.), *cert. denied*, —— U.S. ——, 109 S.Ct. 260, 102 L.Ed. 2d 248 (1988). An early retirement program which requires an employee to make the difficult choice between retirement with the receipt of previously unavailable incentives and continued work under the same conditions, however, does not result in constructive discharge because the employee is no worse off whichever option the employee chooses. *Henn v. Nat'l Geographic Soc'y*, 819 F.2d 824 (7th Cir.), *cert. denied*, 484 U.S. 964, 108 S.Ct. 454, 98 L.Ed.2d 394 (1987); *Schuler v. Polaroid Corp.*, 848 F.2d 276 (1st Cir.1988).

Mobil claims that since Mr. Mitchell did not establish a prima facie case of age discrimination by constructive discharge, the trial court erred in rejecting its motion for a directed verdict on the ADEA claim. We will reverse the trial court's denial of a motion for a directed verdict only if, viewed in the light most favorable to the nonmoving party, the evidence and all reasonable inferences to be drawn therefrom point but one way, in favor of the moving party. *Zimmerman v. First Federal Sav. & Loan Ass'n*, 848 F.2d 1047, 1051 (10th Cir.1988).

Mobil first contends that the trial court erred in denying its motion for a directed verdict because *Derr* pre-

cludes recovery for violations of the ADEA absent a showing that an employer subjected its employee to difficult or intolerable working conditions. 796 F.2d at 344. Mr. Mitchell himself admitted at trial that his working conditions were not unpleasant, that he was well regarded by his superiors, and that he enjoyed his work at Mobil. The fact that Mr. Mitchell was happy at Mobil and worked harmoniously with his colleagues and superiors, however, does not preclude a finding that Mobil's offer of early retirement constituted age discrimination by constructive discharge. The relevant question in this case is whether Mobil's amendment of the Plan forced Mr. Mitchell, and similarly situated employees, to choose between two options both of which would leave him worse off than the status quo.

Mobil contends that it did not confront Mr. Mitchell with such a choice. Instead, it gave him an extra benefit unavailable to employees under the age of fifty-five, the choice to elect the lump-sum option at the $250,000 threshold. Mobil's argument is disingenuous. Its program, unlike that in *Henn,* 819 F.2d at 826, did not give Mr. Mitchell a choice between the receipt of a previously unavailable early retirement incentive and the continuation of work under the status quo which preceded the offer of early retirement. Instead, Mobil created a choice between two options either of which would leave Mr. Mitchell worse off than he had been prior to the change in the Plan. One choice would permit Mr. Mitchell to retire by Febrary 1, 1985, at the age of fifty-six, and receive the lump-sum option under the old eligibility criteria. Prior to Mobil's amending the Plan, however, Mr. Mitchell could have worked until the age of sixty-five and still remain eligible for the lump-sum option under the old criteria. The other choice would permit Mr. Mitchell to continue working, but whereas prior to the Plan's amendment he could be certain to qualify for the lump-sum option, now, because Mobil had increased the threshold and linked it to the CPI, he would have to

requalify for this benefit for which he had already become eligible at the age of fifty-five. Moreover, he would never be certain that he could achieve the potentially increasing threshold by retirement age.

As Mobil points out, to establish a prima facie case of age discrimination by constructive discharge, Mr. Mitchell had to prove not only that Mobil confronted him with a choice between two evils but also that Mobil would have treated him and other older employees less favorably, because of their age, had they remained on the job. Mobil asserts that since all employees were subject to the new eligibility criteria, Mr. Mitchell cannot demonstrate that the amendment of the Plan adversely affected him because of his age. Like Mr. Mitchell, employees under the age of fifty-five who had accumulated pension benefits in excess of $250,000, but less than $450,000, or who had a net worth of between $250,000 and $450,000, also lost the opportunity to obtain the lump-sum benefit under the old criteria. Indeed, for this group of employees that opportunity was irretrievably lost, whereas Mr. Mitchell could still take advantage of it if he chose to retire prior to February 1, 1985.

Mobil's argument ignores the Plan's requirement that an employee be over the age of fifty-five before he can qualify for the lump-sum benefit. Although Mobil's employees who were under age fifty-five at the time Mobil amended the eligibility criteria might have expected to obtain the lump-sum benefit, none of them qualified for it at that time; consequently, only employees over the age of fifty-five who had already qualified to receive the lump-sum benefit, like Mr. Mitchell, would have to *requalify* for it under the new eligibility criteria if they decided to stay on the job. Since Mr. Mitchell did establish, as a matter of law, that he had been constructively discharged because of his age, the trial court properly denied Mobil's motion for a directed verdict.

B. The Jury Charge on Mr. Mitchell's Prima Facie Case

This court will find reversible error in a trial court's jury instructions only if we have substantial doubt whether the instructions, taken together, properly guided the jury in its deliberations. *Lutz v. Weld County School Dist. No. 6*, 784 F.2d 340, 341 (10th Cir.1986). The paradigmatic instruction on the element of intolerability in a constructive discharge case is "whether the employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign." *Derr*, 796 F.2d at 344. A trial court should, however, tailor this instruction to fit the facts of the case. *See Paolillo v. Dresser Indus., Inc.*, 865 F.2d 37, 40 (2d Cir.1989).[1]

Mobil contends that the trial court made two errors in its constructive discharge instructions. First, the court did not require the jury to find, as stated in *Derr*, that Mr. Mitchell's working conditions were intolerable or difficult. Instead, the court instructed the jury that it could find constructive discharge by forced retirement if "a reasonable person would also have felt compelled to retire under the circumstances with which Mr. Mitchell was faced in 1984 and 1985." We have no doubt that this instruction properly guided the jury in its deliberations. An instruction patterned after the *Derr* paradigm is particularly apt in cases where an employee, who is a member of a protected class, claims that an employer forced the employee to resign by creating on-the-job conditions directed specifically at that employee. It is less suitable where, as here, an employee claims that the employer's offer of early retirement constitutes age discrimination by constructive discharge. The instruction given takes

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[1] Indeed, trial judges should always avoid verbatim adoption of language from appellate opinions to formulate instructions. That which is meaningful to those with a legal education is often lost upon others; therefore, a carefully crafted instruction always is tailored to fit the case in language non-lawyers will comprehend.

this distinction into account and is, therefore, properly tailored to the facts of the case.

Mobil also assigns as error the trial court's failure to require the jury to find a link between the choice which Mobil imposed upon Mr. Mitchell by amending the Plan and Mr. Mitchell's age. It specifically objects to the following instructions:

> [T]o take early retirement constitutes constructive discharge, one, if the decision is induced by withholding or reducing or threatening to withhold or reduce benefits from those who choose not to retire, or, two, if each choice facing the employee as a result of the change in the threshold provisions of the retirement plan leaves him worse off than before.[2]

Mobil ignores, however, the trial court's preliminary instruction that Mr. Mitchell "must prove that Mobil's specific employment practices or policies adversely affected people in his age group at a substantially higher rate than they affected those in younger age groups." Since these instructions, taken together, properly state the law governing this case, we reject Mobil's claim that the trial court improperly instructed the jury.

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[2] The Association of Private Pension and Welfare Plans, as *amicus curiae*, asserts that the first alternative in this jury charge would effectively outlaw voluntary early retirement programs by prohibiting employers from offering special incentives that will not be available to those who choose to remain employed. Read out of context, the jury charge does support this interpretation which would misstate the law. When the jury instructions are read as a whole, however, the trial court's reference to the "withholding or reducing or threatening to withhold or reduce benefits from those who choose not to retire" clearly addresses those situations in which the employer uses a stick, the reduction or withholding of benefits to which the employee was entitled prior to the offer of early retirement, to force employees to accept an offer of early retirement.

C. Retroactive Application of Public Employees Retirement System of *Ohio v. Betts*

After trial and after Mr. Mitchell filed his Reply Brief, the Supreme Court decided *Public Employees Retirement Sys. of Ohio v. Betts*, —— U.S. ——, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989), which redefined the elements of a prima facie case of age discrimination based on changes in an employer's benefits plan by reinterpreting § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2). That section exempts from liability under the ADEA any employer who "observe[s] the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of" the ADEA. Prior to *Betts*, this court and several other courts of appeal held that an employer had the burden of establishing as an affirmative defense that its early retirement program fell within the exemption of § 4(f)(2) by proving that (1) its plan was bona fide; (2) its actions were in observance of the terms of the plan; and, (3) its plan was not a subterfuge to evade the purposes of the Act. *EEOC v. Cargill, Inc.*, 855 F.2d 682, 684 n. 2 (10th Cir.1988); *EEOC v. Westinghouse Elec. Corp.*, 725 F.2d 211, 223 (3d Cir.1983), *cert. denied*, 469 U.S. 820, 105 S.Ct. 92, 83 L.Ed.2d 38 (1984); *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 318 (7th Cir.), *cert. denied*, 486 U.S. 1044, 108 S.Ct. 2038, 100 L.Ed.2d 622 (1988). An employer could disprove subterfuge by showing a cost-based justification for age-related reductions in benefits. *See Karlen*, 837 F.2d at 319; *EEOC v. City of Mt. Lebanon*, 842 F.2d 1480, 1492 (3d Cir.1988); 29 C.F.R. § 860.120 (a)(1), (d)(1)-(3) (1980), redesignated 29 C.F.R. § 1625.10(a)(1), (d)(1)-(3) (1988).

The *Betts* court implicitly overruled this prior case law. It held that § 4(f)(2) is not an affirmative defense which the employer has the burden of proving, but rather part of the plaintiff's prima facie case. 109 S.Ct. at 2868.

Under *Betts*, an employee who claims that his employer's benefits program violates the ADEA bears the burden of proving subterfuge by showing "that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relationship," such as hiring and firing or wages and salaries. *Id.* We must now determine whether, as Mobil contends, *Betts* should be retroactively applied to this case.

Our determination whether to apply *Betts* retroactively requires the weighing of three factors: (1) whether *Betts* "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; (2) whether, after looking at the prior history of the *Betts* rule and at its purpose and effect, "retrospective operation will further or retard its operation"; and, (3) whether retroactive application of the *Betts* rule would be inequitable. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355-56, 30 L.Ed.2d 296 (1971) (citations omitted). Each factor need not compel prospective application. *Jones v. Consolidated Freightways Corp.*, 776 F.2d 1458, 1460 (10th Cir.1985). Where, for example, a decision " 'could produce substantial inequitable results if applied retroactively, there is ample basis . . . for avoiding the "injustice or hardship" by a holding of nonretroactivity.' " *Chevron*, 404 U.S. at 107, 92 S.Ct. at 355 (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 1900, 23 L.Ed.2d 647 (1969) (per curiam)).

Betts clearly established a new principle of law by transforming what had been an affirmative defense into an element of an employee's prima facie case. Prior to *Betts*, every circuit which addressed the applicability of § 4(f)(2) to claims of age discrimination in employee benefit programs viewed it as an affirmative defense.

Potenze v. New York Shipping Ass'n, Inc., 804 F.2d 235, 237 (2d Cir.1986), *cert. denied*, 481 U.S. 1029, 107 S.Ct. 1955, 95 L.Ed.2d 528 (1987); *EEOC v. City of Mt. Lebanon*, 842 F.2d 1480, 1488 (3d Cir.1988); *Crosland v. Charlotte Eye, Ear and Throat Hosp.*, 686 F.2d 208, 211 (4th Cir.1982); *Betts v. Hamilton County Bd. of Mental Retardation and Developmental Disabilities*, 848 F.2d 692, 694-95 (6th Cir.1988), *rev'd sub nom. Public Employees Retirement Sys. of Ohio v. Betts*, —— U.S. ——, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989); *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 318 (7th Cir.), *cert. denied*, 486 U.S. 1044, 108 S.Ct. 2038, 100 L.Ed.2d 622 (1988); *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1395 (9th Cir.1984); *EEOC v. Cargill, Inc.*, 855 F.2d 682, 684 (10th Cir.1988). None even considered that § 4(f)(2) established an element of plaintiff's prima facie case. This *Chevron* factor, therefore, strongly favors nonretroactive application of *Betts*.

Retroactive application of *Betts* in this case would not further the purpose behind its new interpretation of § 4(f)(2): to exempt "the provisions of a bona fide benefit plan from the purview of the ADEA so long as the plan is not a method of discriminating in other, nonfringe-benefit aspects of the employment relationship." 109 S.Ct. at 2866. Mr. Mitchell asserts that Mobil constructively discharged him because of his age by manipulating the availability of the lump-sum benefit. In other words, Mr. Mitchell claims that Mobil used its benefit plan to discriminate against him in a nonfringe-benefit aspect of employment relationship. His claim is excatly the type from which the *Betts* court did not intend to insulate employers. Retroactively applying *Betts*, however, would, in effect, insulate Mobil from Mr. Mitchell's claim because Mr. Mitchell did not present as part of his prima facie case evidence of Mobil's intent to use the amendment of the lump-sum provision to discriminate against him in a nonfringe-benefit aspect of the employ-

ment relationship. The second *Chevron* factor, therefore, also weighs against retroactive application of *Betts*.

Considerations of equity also undercut Mobil's contention that *Betts* should be applied retroactively. Mobil first mentioned § 4(f)(2) in its Reply Brief, filed just over two weeks after *Betts* was decided. Despite the fact that § 4(f)(2) was available to Mobil as an affirmative defense prior to *Betts*, Mobil did not plead that defense in its Answer or in its Answer to the Amended Complaint. Not surprisingly, Mr. Mitchell presented no evidence at trial on the applicability of § 4(f)(2) to his claims, nor did Mobil. Since this case proceeded for over three years prior to Mobil's filing its Reply Brief—through discovery, trial, and initial briefing on appeal—without any mention of § 4(f)(2) as an affirmative defense for Mobil, it would work a grave injustice for us to hold that *Betts* applies retroactively.[3] This result is one which we must avoid.

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[3] In *Robinson v. County of Fresno*, 882 F.2d 444 (9th Cir.1989), the Ninth Circuit applied *Betts* retroactively without resorting to the *Chevron* inquiry. In that case, Mr. Robinson, an employee of the County of Fresno, claimed that a modification to the County's retirement plan violated the ADEA because it resulted in his receiving a smaller pension than other retirees who were younger at the time of hiring. *Id.* at 445. The Ninth Circuit affirmed the district court's granting of the County's motion for summary judgment because Mr. Robinson had not established, as *Betts* requires, that the county intended the modification to the plan to discriminate against him in an aspect of the employment relationship unrelated to fringe benefits. *Id.* at 447.

We believe that even if the Ninth Circuit had applied the *Chevron* test, the result would have been the same. *Robinson*, nonetheless, is distinguishable from this case. Mr. Robinson did not assert, as Mr. Mitchell does, that the modification to the County's plan discriminated against him in a nonfringe-benefit aspect of the employment relationship such as hiring and firing or wages and salaries. A refusal to apply *Betts* retroactively, therefore, would have retarded the purpose behind that decision. In addition, since *Robinson* was only at the summary judgment stage at the time *Betts* was decided, applying *Betts* retroactively would not result in

D. Mobil's Business Justification and Mr. Mitchell's Claim of Pretext

If an employee establishes his prima facie case of age discrimination by constructive discharge, the employer then has the opportunity to rebut the presumption of discrimination by producing evidence of a legitimate, nondiscriminatory business reason for its conduct. *EEOC v. University of Oklahoma*, 774 F.2d 999, 1002 (10th Cir. 1985), *cert. denied*, 475 U.S. 1120, 106 S.Ct. 1637, 90 L.Ed.2d 183 (1986); *Connecticut v. Teal*, 457 U.S. 440, 446-47, 102 S.Ct. 2525, 2530-31, 73 L.Ed.2d 130 (1982). To prevail, the employee must then prove that the employer's proffered justification is "a mere pretext for discrimination." *Teal*, 457 U.S. at 447, 102 S.Ct. at 2530. The employee can establish pretext "by showing that the employer's proffered explanation is unworthy of credence." *University of Oklahoma*, 774 F.2d at 1002.

Mobil claims that since it forwarded a legitimate business justification and Mr. Mitchell failed to prove that it was a pretext, the trial court erred in denying its motion for a directed verdict. We will reverse the trial court's denial of a motion for a directed verdict only if, viewed in the light most favorable to the nonmoving party, the evidence and all reasonable inferences to be drawn therefrom point but one way, in favor of the moving party. *Zimmerman*, 848 F.2d at 1051. Alternatively, Mobil claims that the evidence was insufficient to support the jury's finding in favor of Mr. Mitchell on this issue. We will uphold the jury's verdict unless it is clearly erroneous, or there is a lack of evidence to support it. *Colorado Coal Furnace Distribs. v. Prill Mfg.*, 605 F.2d 499, 502 (10th Cir.1979).

At trial, Mr. Mitchell claimed that Mobil's raising the eligibility threshold for the lump sum from $250,000 to

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the high degree of injustice which retroactive application would cause in this case.

$450,000 and linking it to the CPI combined with its delaying for six months the effective date of these changes forced him to choose early retirement, resulting in age discrimination by constructive discharge. Mobil introduced evidence to justify both of these amendments to the Plan. It claimed that because inflation had eroded the real dollar value of the $250,000 threshold, which had been set in 1977, the number of employees who were eligible for, and taking advantage of, the lump-sum option had increased dramatically, creating a serious drain on Mobil's pension fund. By increasing the threshold to $450,000 and linking it to the CPI, Mobil would both restore the threshold to the equivalent of its original level in 1977 dollars and protect it from future erosion by inflation. These changes in turn would stop the drain on Mobil's pension plan resulting from the overutilization of the lump-sum option.

Mobil claimed that it delayed the effective date of these changes, rather than implementing them immediately, out of fairness to its employees. The six-month notice period would give Mobil employees an adequate transition period to consider their choice rather than simply pulling the rug out from under them. It would also give retiring employees, who were earning their peak salaries, six months to accrue additional pension benefits since Mobil calculated these benefits based on a retiring employee's highest average salary over a period of thirty-six months.

At trial, Mr. Mitchell asserted that these justifications were unworthy of credence. He contended that Mobil amended the Plan in the manner it did to force the retirement of older Mobil employees who would become redundant as a result of an impending merger with Superior Oil Company. Mr. Mitchell asserted that Mobil needed to force these employees into early retirement to avoid large severance payments which the merger agreement required it to make to Superior employees laid off as a result of the merger. Mobil could achieve this objec-

tive only by combining an increase in the threshold with a notice period during which employees would be forced to retire early to obtain the lump-sum benefit.

Mr. Mitchell contends that several circumstances which he proved support his claim of pretext. In September 1983, mid-level Mobil executives began considering alternatives to the $250,000 threshold. In mid-December, the Mobil executive primarily responsible for changes to the Plan informed his superior—the Vice President for Employee Relations, who was also a member of the Executive Committee of Mobil's Board of Directors—that an increase in the threshold would require notice to employees and a transition plan to control the accelerated retirements of employees eligible for the lump sum. On January 9, 1984, the Executive Committee requested the Vice President for Employee Relations to continue the evaluation of an increase in the threshold and directed him to incorporate into future proposals for change a reasonable transition period between the announcement of the increased threshold and its effective date during which employees could take advantage of the old eligibility criteria.

On February 9, 1984, Mobil's Executive Committee adopted the increase in the threshold to $450,000 and linked it to the CPI. It also decided to give employees at least six months' notice of this change so they could retire and obtain the lump sum under the old eligibility requirements. The Executive Committee recognized that the announcement of an increase in the threshold approximately six months prior to the effective date of the change would lead to the early retirement of between 1000 and 1300 employees.

One week prior to its February 9 meeting, the Executive Committee reviewed "at length" [4] the possibility of a

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[4] *See* "Excerpt from Minutes of Executive Committee Meeting held on Thursday, February 2, 1984." (Addendum to Brief of Mobil

merger with Superior and authorized Mobil's President to proceed with negotiations. Mr. Mitchell contends that because the Executive Committee reviewed the opportunity to merge with Superior at length on February 2, 1984, one can reasonably infer that the Executive Committee knew about the redundancy problem which would result from the merger prior to January 9, 1984, when it directed the Vice President for Employee Relations to incorporate a notice period into any future proposals for changes to the Plan. Mr. Mitchell produced no evidence to support this inference, however, and the record does not otherwise indicate any link between Mobil's merger with Superior and the Executive Committee's decision at its January 9 meeting to incorporate a notice period into any future changes in the Plan. In fact, the evidence points the other way since the Executive Committee adopted the transition period just one week after it authorized Mobil's President to negotiate with Superior and over one month before Mobil and Superior signed the merger agreement. The inference which Mr. Mitchell asks us to draw, therefore, is not a reasonable one, and his claim of pretext must fail. *See Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 521 (10th Cir.1987) (quoting *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 895 (3d Cir.), *cert. denied*, 454 U.S. 893, 102 S.Ct. 390, 70 L.Ed.2d 208 (1981)) ("An inference is reasonable where 'there is a reasonable probability that the conclusion flows from the proven facts.' ")

Since Mr. Mitchell did not meet his burden of production on the issue of pretext, the onerous effects of the changes in the plan notwithstanding, we reverse the trial court's denial of Mobil's motion for a directed verdict. Because we hold that Mobil did not violate the ADEA,

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Oil Corporation, Plaintiff's Exhibit 177). The term "at length" is not defined in the minutes, and we find no other description in the record indicating the length of the review or what it entailed.

we need not review Mr. Mitchell's cross-appeal on issues relating to the measure of damages.

III. THE ERISA CLAIMS

At trial, Mr. Mitchell claimed that Mobil's amendments to the Plan violated both § 204(g) of ERISA, 29 U.S.C. § 1054(g), which prohibits employers from reducing the accrued benefits of participants in a benefit plan, and § 510 of ERISA, 29 U.S.C. § 1140, which prohibits an employer from discriminating against a participant "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." Mr. Mitchell also claimed that Mobil breached its duty as the fiduciary of the Plan by amending the Plan in the manner that it did. After determining that Mr. Mitchell met ERISA's requirements for standing, the district court held in his favor on all of his ERISA claims and awarded him $588,703.58 in compensatory damages and $405,962.76 in liquidated damages. Mobil challenges the district court's conclusion that Mr. Mitchell had standing as well as its holdings in his favor. Since Mobil's appeal involves pure questions of law, our review of the trial court's holdings is *de novo*. *Sage v. Automation, Inc. Pension Plan and Trust*, 845 F.2d 885, 890 (10th Cir. 1988).

ERISA and its legislative history emphasize Congress's intent to provide those protected by the Act "ready access to the federal courts," 29 U.S.C. § 1001(b), and liberal remedies. *See* S.Rep. No. 127, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.Code Cong. & Admin. News 4639, 4838, 4871;[5] H.R.Rep. No. 533, 93d Cong., 2d Sess.,

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[5] This report of the Senate Labor and Public Welfare Committee states:

> The enforcement provisions [of ERISA] have been designed specifically to provide both the Secretary [of Labor] and *participants and beneficiaries* with broad remedies for redressing or preventing violations of the [Act]. . . . The intent of the

reprinted in 1974 U.S.Code Cong. & Admin.News 4639, 4647.[6] Although the Act has a broad remedial purpose, only participants, beneficiaries, and fiduciaries of an employee benefit plan may avail themselves of its protections. 29 U.S.C. § 1132(a). This limitation on the group of potential claimants is necessary to avoid the creation of uncertainties about an employer's obligations under ERISA and to prevent the imposition of "great costs on pension plans for no legislative purpose." *Saladino v. I.L.G.W.U. Nat'l Retirement Fund*, 754 F.2d 473, 476 (2d Cir.1985).

ERISA defines a "participant" as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer." 29 U.S.C. § 1002(7). This definition includes "former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits." *Firestone Tire and Rubber Co. v. Bruch*, —— U.S. ——, 109 S.Ct. 948, 958, 103 L.Ed.2d 80 (1989) (quoting *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.) (per curiam), *cert. denied*, 479 U.S. 916, 107 S.Ct. 318, 93 L.Ed.2d 291

Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits *due participants.*

(Emphasis added.)

[6] This report of the House Committee on Education and Labor states:

[T]he Committee recognizes the absolute need that safeguards for *plan participants* be sufficiently adequate and effective to prevent the numerous inequities to workers under plans which [inequities] have resulted in tragic hardship to so many.

(Emphasis added.)

(1986)). It excludes, however, former employees who have received a lump-sum payment of all their vested benefits because "these erstwhile participants have already received the full extent of their benefits and are no longer eligible to receive future payments." *Joseph v. New Orleans Electrical Pension & Retirement Plan*, 754 F.2d 628, 630 (5th Cir.), *cert. denied*, 474 U.S. 1006, 106 S.Ct. 526, 88 L.Ed.2d 458 (1985). These claimants seek a damage award, not vested benefits improperly withheld. *Kuntz*, 785 F.2d at 1411. The fact that an employee takes his lump sum under protest does not preserve his standing as long as an employer properly pays out all the vested benefits owed to the employee. *Yancy v. American Petrofina, Inc.*, 768 F.2d 707, 708-09 (5th Cir.1985).

Mobil claims that the trial court erred in granting Mr. Mitchell standing because he has never had a reasonable expectation of returning to covered employment, nor does he have a colorable claim to vested benefits. We agree. After Mr. Mitchell retired on January 1, 1985, he received all of his vested pension benefits in a single lump sum. Although he filed a protest under Mobil's internal procedures, he did not claim that Mobil had improperly withheld vested benefits. He also did not make such a claim in his complaint, nor did he seek reinstatement. Instead, he claimed that Mobil's violation of ERISA entitled him to additional benefits which he would have received had Mobil's amendments to the Plan not compelled him to retire at fifty-six, rather than sixty. Since these benefits had not yet vested, Mr. Mitchell could not have a colorable claim to vested benefits, but only a claim for compensatory damages. Furthermore, Mr. Mitchell never sought reinstatement; therefore, he also could not have a reasonable expectation of returning to covered employment. Because Mr. Mitchell failed to prove that he was still a participant in the Plan, it is inescapable that he did not have standing to seek enforcement of his ERISA

claims. The trial court's holding that Mr. Mitchell is entitled to recover under ERISA, therefore, must be reversed.

For the foregoing reasons, we REVERSE the judgment of the district court.

APPENDIX D

Order of the United States District Court for the District of Colorado Certifying Question of Law Under 28 U.S.C. § 1292(b), July 21, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 88-Z-2112

FREDERIC J. RAYMOND, *et al.*,
Plaintiffs,

v.

MOBIL OIL CORPORATION, *et al.*,
Defendants.

ORDER CERTIFYING QUESTION
UNDER 28 U.S.C. § 1292(b)

[Filed July 21, 1992]

This matter came before the Court on June 25, 1992, at a hearing in which defendant Mobil's Motion For Summary Judgment On ERISA Claims was denied. In denying the defendants' motion, the Court found that the arguments presented by the parties involved a controlling issue of law as to which there was a substantial ground for difference of opinion. The controlling question of law presented at the hearing was as follows:

> Are former employees who argue that but for the allegedly fraudulent conduct of their employer they would have remained in covered employment partici-

pants with standing to sue under ERISA, 29 U.S.C. § 1132, despite having already received a lump sum payment of all of their vested pension benefits through the date of their retirement?

The Court finds that the foregoing issue is controlling within the meaning of 28 U.S.C. § 1292(b), and that an immediate appeal may materially advance the ultimate termination of this litigation.

DATED at Denver, Colorado, this 21st day of July, 1992.

BY THE COURT:

/s/ Zita L. Weinshienk
ZITA L. WEINSHIENK
Judge
United States District Court

APPENDIX E

Order of the Tenth Circuit Court of Appeals Denying Petition for Rehearing and Suggestion of Rehearing En Banc, March 10, 1993

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 92-1298

FREDERIC RAYMOND, J.A. MORRISON, ROBERT G. JACOBSEN, DONALD F. HILL, GEORGE H. LIVERIS, ROBERT A. IRWIN, A.D. BOND, VIRGINIA HOWARD, IRA S. REAVIS, BILLY RHEA SARGENT, for themselves and on behalf of others similarly situated, and others as opt in or consent plaintiffs pursuant to applicable federal law,
Plaintiffs-Appellees,

v.

MOBIL OIL CORPORATION,
Defendant-Appellant.

ORDER

Entered March 10, 1993

Before McKAY, Chief Judge, and LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL and KELLY, Circuit Judges.

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER
Clerk

By: /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

APPENDIX F

Denial of Motion for Summary Judgment of the United States District Court for the District of Colorado, dated June 25, 1992

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[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 88-Z-2112

FREDERIC J. RAYMOND, *et al.*,
Plaintiffs,

vs.

MOBIL OIL CORPORATION, *et al.*,
Defendants.

REPORTER'S TRANSCRIPT

(Hearing on Motion for Summary Judgment)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 9:50 a.m., on the 25th day of June, 1992, Courtroom C-502, United States Courthouse, Denver, Colorado.

APPEARANCES

PRYOR, CARNEY, and JOHNSON, P.C., by RODNEY R. PATULA and ELIZABETH MORAN, Attorneys at Law, 6200 South Syracuse Way, Suite 400, Englewood, Colorado, 80155, appearing for the plaintiffs.

HADDON, MORGAN & FOREMAN, P.C., by HAROLD A. HADDON and MAUREEN A. CAIN, Attorneys at Law, 150 East Tenth Avenue, Denver, Colorado, 80203; LOREN KIEVE, Attorney at Law, Debevoise & Plimpton, 555 13th Street, N.W., Washington, D.C., [2] 20004, and MICHAEL E. TIGAR, Attorney at Law, 727 East 26th Street, Austin, Texas, 78705, appearing for the defendant.

* * * *

THE COURT: Thank you.

I think perhaps we should start, if you want to just have a seat for a moment—

MR. TIGAR: Yes, your Honor.

THE COURT: —by my telling you how this looks to me on the briefing and on the paper. This is a motion for summary judgment on the ERISA claims, and it appears to me from looking at the briefs, from looking at the claims, from reviewing the *Christopher v. Mobil Oil* case in the Fifth Circuit and the [3] *Mitchell v. Mobil Oil* case in this circuit and all of the other cases that have been decided, including *Firestone*, that what Plaintiff has done in pleading this ERISA or these ERISA claims is to fit them as closely as possible under the rulings of *Christopher* and trying to avoid in the pleading the adverse effects of rulings of *Mitchell*. And it appears to me also that reading *Christopher* carefully, there are factual issues which were left open under *Christopher*, which were not discussed in *Mitchell*, which probably this court is going to have to try.

Now, that's how it looks on paper; and I'm certainly going to listen to the arguments of the defendants as to why this is not the case. But I think we have some primary cases here to consider. Well, the two core cases that were argued in the briefs were the *Christopher* case and the *Mitchell* case. But if this case is fit very carefully under the ruling in *Christopher* and does not appear

to be covered by the ruling in *Mitchell,* then the motion will have to be denied.

* * * *

[38] RULING

THE COURT: Well, let me address *Boren.* Mr. Boren was not an employee within the meaning of ERISA; and when he asked to be treated as if he were a former employee, he is asking for a determination that he was at one time an employee, as opposed to the position of the plaintiffs. As I understand Plaintiffs' theory is saying that but for the actions of Defendant, they still would be employees of Defendant; and this case is predicated on the fact that they were employees at one time, unlike Boren.

I realize that Judge McKay, who this court has the most high respect for—and I do for Judge Moore, too, and all the Tenth Circuit judges—made some statements in *Boren* which appear to be fairly broad statements. But indeed, in looking at the facts of *Boren,* they were talking about a factual situation which does not appear to me, at least, to apply in this case.

There are many rules and many cases about granting motions for summary judgment, and I think judges sometimes overlay on this law their own experiences with summary judgment. Having been a judge for a long time, I have an overlay; and that is, it's sort of like the old "I know it when I see it," which used to be the rule in pornography cases. When I am [39] comfortable that there are no factual issues and when I can grant something as a matter of law, when I have that feeling that there are no factual issues, when I have to decide the case on summary judgment and all the facts and the arguments convince me of that, then I grant the motion for summary judgment—you know—considering all of the other cases that are there on summary judgment.

But when I have this lingering feeling that there may be factual issues, even though I think probably there is going to be a difficult time, there is going to be a difficult effort of plaintiff to prove these factual issues—I don't think it's going to be easy; I think it's going to be most difficult—when I have this nagging feeling that well, I'm not sure as a matter of law that we've really taken care of all factual issues, then I simply have to resolve it by denying the motion for summary judgment.

Now, what we have here are two very important cases, one in the Tenth Circuit and one in the Fifth Circuit. And the question is, can they be distinguished? Does the Fifth Circuit carve out an area which was not considered by the Tenth Circuit and which has to be considered by this court, even in view of the strong ruling of the Tenth Circuit?

And I will admit, as much respect as I do have for the judges that decided *Mitchell v. Mobil,* I really do wonder if they read my opinion carefully on the ERISA claims in finding [40] that he didn't seek reinstatement—that Mr. *Mitchell* didn't.

Be that as it may, that's the rule. I'm bound by that decision. I have no intent to be overruled in the Tenth Circuit, if I can uphold it; and what we have, then, is the Fifth Circuit carving out a little area from Mobil and saying, if I can just paraphrase what they say on 1223 of their opinion—and maybe I better put this on the record. For the record, *Christopher v. Mobil* is 950 F.2d 1209, Fifth Circuit, 1992. What they say is here's an area that might—might; it isn't for sure—might distinguish this case from *Mitchell,* and that is if a plaintiff is alleging deceptive conduct which vitiates the voluntariness of the decision to retire, the "but for" test, that might distingush this case from *Mitchell.*

Plaintiffs have fit in this case right to that exception; and they say, We are alleging and we intend to prove—now, I don't know if they're going to be able to prove

it; it's going to be tough—but we are alleging and we intend to prove deceptive conduct which will show that none of these plaintiffs would have retired, had they not been deceived, had they not been defrauded. We're talking about fraud here.

Maybe it was hinted at in *Mitchell,* and I don't know what you folks argued; but it really didn't come out that way, it seems to me, in the trial that strongly.

So here's an area: Mitchell (sic), they're arguing, we're alleging, committed fraud on us, deceived us. We would [41] not have retired had we known the truth, had we not been deceived, had we not been defrauded.

The Fifth Circuit, good judges, say this distinguishes or this might distinguish this case from *Mitchell.* All these circuit judges are supposed to be really experts in the law, may be experts in the law more than the trial judges. At least they have the last word. So here are the judges, the three judges on the Fifth Circuit saying, Here's an area that's different, might be distinguished.

I'm not going to say it can't be distinguished. I've got that feeling that boy, I'm not sure. I'm not sure that they can't prove it. And if they can they can prove it, they have to have the chance to prove it.

I think one must read the law also with good common sense and good judgment; and if, indeed, hypothetically an employee has been deceived by an employer—I'm not talking about Mobil now, but just what is the policy, what should be the law. If an employee has been deceived, defrauded by the employer, and retires because of that deceit when they never would have retired, does that mean they can't sue under 510, just because they've taken benefits? And common sense tells us there have to be—there has to be an exception to the flat rule stated in *Mitchell* and this deceptive conduct certainly from a matter of policy, from a matter of good common sense, seems to be that area.

[42] So even though there might be a bright line rule in *Mitchell,* there appears to this court that there might very well be, as stated by the *Christopher* court, a way of distinguishing that; and that is if there is deceptive conduct.

Now, if the plaintiffs can prove it—I don't know if they can prove it sufficiently—but if they can prove it, then I think we do have a distinguishing feature and I think they have brought their case in an area that fits under—fits under the *Christopher* case and may very well be an area which would cause the Tenth Circuit to say, You know, we didn't really mean that. We really didn't mean that if there is something promised the following year and then they're defrauded and they're retiring because they're defrauded that the ERISA—that they're foreclosed from suing under ERISA.

So looking at the statute with good judgment and what the policy should be, which is to protect the employees, looking at the fact that these were employees, their allegation is that they would not have retired. They have brought this case under the very narrow confines of *Christopher.*

I don't feel I can grant the motion for summary judgment; and accordingly, the motion for summary judgment on the ERISA claims will be denied and we'll have to hear what the facts are.

Now, one more thing: We now no longer have motions for directed verdict in Federal Court. We have motions for [43] judgment on the law. The rules have been changed. So if, indeed, this proof does not come forward, I'll be hearing your argument, maybe not even at the end of the plaintiffs' case, maybe in the middle of the plaintiffs' case, when they have a chance to go through ERISA, whichever one they're going to prove first. But this is something that I'm sure that will come up for argument in the trial case—in the trial.

* * * *

APPENDIX G

STATUTORY PROVISIONS

ERISA § 3, 29 U.S.C. § 1002

For purposes of this subchapter:

* * * *

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

* * * *

(9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

ERISA § 502, 29 U.S.C. § 1132

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant of beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary *(A)* to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or *(B)* to obtain other appropriate equitable relief *(i)* to redress such violations or *(ii)* to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of [section] 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary *(A)* to enjoin any act or practice which violates any provision of this subchapter, or *(B)* to obtain other appropriate equitable relief *(i)* to redress such violation or *(ii)* to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or *(i)* or *(l)* of this section.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf.

In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator *(A)* who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or *(B)* who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have

concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the

amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part

thereof during which the prohibited transaction continues except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(*l*) Civil penalties on violations by fiduciaries

(1) In the case of—

(A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

ERISA § 510, 29 U.S.C. § 1140

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which

he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.